Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

A. EUGENE MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the two-year limitation period in 26 U.S.C. § 6532(a)(1) is triggered by a purportedly final notice of disallowance issued by the Internal Revenue Service when:

(a) The otherwise adequate notice fails to disclose any consideration or rejection of one of two grounds for refund fully presented in the underlying tax refund claim;

(b) The Service presents no evidence that the ground was considered on the merits before the notice was issued; and

(c) After the two-year period following the purported disallowance, the Service for the first time considers one of the refund grounds on the merits?

2. Whether a taxpayer, faced with a Service claim that his tax refund suit is untimely filed under 26 U.S.C. § 6532(a)(1), may invoke the Service's failure to follow its own internal rules and procedures for handling tax refund claims as relevant to a jurisdictional fact issue; i.e., whether a refund ground presented was actually considered on the merits, either before the purported notice of disallowance was issued, or for the first time during the two-year period immediately prior to commencement of the tax refund suit?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

Mr. Miller's Tax Refund Claim 3

Service Response to Mr. Miller 5

Mr. Miller Seeks a Merits-Based Decision on His Claim 6

Proceedings Below 8

REASONS FOR GRANTING THE PETITION 9

Introduction 9

I. THE DECISION BELOW THREATENS THE VITALLY IMPORTANT SCHEME OF FEDERAL TAX COLLECTION, REFUND AND REFUND LITIGATION BY NULLIFYING THE TAXPAYER'S RIGHT TO MERITS-BASED CONSIDERATION BY THE SERVICE OF PROPERLY PRESENTED REFUND CLAIMS 11

II. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISION IN THIS CASE AND THE DECISIONS OF OTHER FEDERAL COURTS THAT RECOGNIZE THAT MERITS-BASED SERVICE CONSIDERATION OF A GROUND FOR A REFUND CLAIM IS ESSENTIAL TO TRIGGER THE TWO-YEAR LIMITATIONS PERIOD IN 26 U.S.C. § 6532(a)(1) 16

TABLE OF CONTENTS – Continued

Page

III. THE COURT SHOULD RESOLVE A CIRCUIT COURT CONFLICT ON THE EVIDENTIARY RELEVANCE OF A SERVICE FAILURE TO FOLLOW ITS OWN INTERNAL RULES AND PROCEDURES IN PROCESSING TAX REFUND CLAIMS 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES:

A. G. Reeves Steel Constr. Co. v. Weiss, 119 F.2d 472 (6th Cir.), *cert. denied*, 314 U.S. 677 (1941) 12

Bartley v. United States, 123 F.3d 466 (7th Cir. 1997) 12

Beardsley v. United States, 126 F. Supp. 775 (D. Conn. 1954) 23

Block-Southland Sportswear Co. v. United States, 73-2 U.S.T.C. ¶ 9552 (4th Cir. 1973), *aff'g per curiam* 73-1 U.S.T.C. ¶ 9230, (E.D.N.C. 1972) 17

Charlson Realty Co. v. United States, 384 F.2d 434 (Ct. Cl. 1967) 18

Clinton Trust Co. v. United States, 52 F. Supp. 671 (Ct. Cl. 1943) 19

Commissioner v. Lane-Wells Co., 321 U.S. 219 (1944) 14

Dalton v. United States, 800 F.2d 1316 (4th Cir. 1986), *cert. denied*, 481 U.S. 1024 (1987) 18

DuPont Glore Forgan, Inc. v. AT&T, 428 F. Supp. 1297 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978) 14

First Alabama Bank, N.A. v. United States, 981 F.2d 1226 (11th Cir. 1993) 12, 19, 21, 22, 23

Gerrard v. Campbell, 81 F. Supp. 752 (N.D. Ill. 1949) 14

Jones v. United States, 26 Cl. Ct. 424 (1992) 18

L&H Co. v. United States, 963 F.2d 949 (7th Cir. 1992) 18

Miller v. United States, 80 AFTR 2d ¶ 97-9074, published July 31, 1997 16

TABLE OF AUTHORITIES – Continued

Page

Morton v. Ruiz, 415 U.S. 199 (1974) 22

Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320 (6th Cir. 1990) 23

Schmitt v. Kavanagh, 91 F. Supp. 659 (E.D. Mich. 1959) 17

Smith v. United States, 478 F.2d 398 (5th Cir. 1973) ..15, 16

Southeast Bank of Orlando v. United States, 676 F.2d 660 (Ct. Cl. 1982) 23

Union Commerce Bank v. United States, 463 F. Supp. 842 (N.D. Ohio 1978), *aff'd*, 638 F.2d 963 (6th Cir. 1981) 17

United States v. Brockamp, ___ U.S. ___, 117 S. Ct. 844 (1997) 13

United States v. Arthur Young & Co., 465 U.S. 805 (1984) 14

W. A. Schemmer Limestone Quarry, Inc. v. United States, 240 F. Supp. 356 (S.D. Ia. 1964) 18

STATUTES:

Federal:

26 U.S.C. § 6511 ..... 11, 13, 14

26 U.S.C. § 6532 ..... 8, 10, 12

26 U.S.C. § 6532(a) 2, 9

26 U.S.C. § 6532(a)(1) ..... *passim*

26 U.S.C. § 6532(a)(4) 2, 18

26 U.S.C. § 7422(a) 3, 11

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1254 1

28 U.S.C. § 1291 3

28 U.S.C. § 1346(a)(1) 3

REGULATIONS:

Treas. Reg. § 1-9100-1 (1970) 5

Treas. Reg. § 301.6402-2(b)(1) 5, 13

RULES:

Supreme Court Rule 10(a) 11

Supreme Court Rule 10(c) 11

Rule 12(b)(1), Fed. R. Civil Procedure 3, 8

Rule 12(b)(6), Fed. R. Civil Procedure 8

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in *A. Eugene Miller v. United States of America*, No. 96-2787, decided on July 11, 1997. Petitioner seeks review of that court's incorrect interpretation and application of the limitations period for commencement of federal tax refund litigation in federal district court, as set forth in 26 U.S.C. § 6532(a)(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished *per curiam* opinion, reprinted in the Appendix at App. 1. The unreported decision of Senior United States District Judge Walter E. Black, Jr., District of Maryland, was a bench decision issued on November 8, 1996. A transcription of that decision is reprinted in the Appendix at App. 25.

JURISDICTION

The judgment of the United States Court of Appeals was entered when petitioner's timely filed petition for rehearing was denied on November 24, 1997. App. 16. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Title 26, United States Code

Sec. 6532. Periods of limitation on suits.

(a) Suit by taxpayers for refund.

(1) General rule. No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

* * *

(4) Reconsideration after mailing of notice. Any consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of a notice by certified mail or registered mail of disallowance shall not operate to extend the period within which suit may be begun.

STATEMENT OF THE CASE

The questions presented arise out of personal federal income tax refund litigation initiated by petitioner, A. Eugene Miller, on March 8, 1996 in the United States District Court for the District of Maryland, pursuant to

§ 7422(a) of the Internal Revenue Code, 26 U.S.C. 7422(a), and 28 U.S.C. § 1346(a)(1). The action was dismissed on the government's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, on account of petitioner's asserted failure to comply with the two-year limitation period set forth in 26 U.S.C. § 6532(a)(1). The final order of dismissal, dated November 8, 1996, App. 34, was timely appealed to the Fourth Circuit pursuant to 28 U.S.C. § 1291.

The facts supporting the government's jurisdictional motion consisted of its undisputed showing that Mr. Miller was sent, by certified mail, a document purporting to be a notice of disallowance of his timely filed tax refund claim for 1990 federal income taxes, on January 13, 1992, i.e., more than two years before suit was filed. App. 35. In opposition, Mr. Miller submitted a detailed declaration, which was also uncontested. The questions presented relate to the proper interpretation and application of the § 6532(a)(1) limitations period in light of the undisputed events preceding and following issuance of the purported disallowance. These historical events, central to a proper resolution of the issues, are summarized below.

Mr. Miller's Tax Refund Claim

In early 1990, shortly after retiring, Mr. Miller requested and received a lump-sum distribution of his retirement fund, a tax-sheltered annuity (TSA). The amount, $168,028.40, was a sum far larger than his annual taxable income. He requested the distribution with the intent of rolling over most of this sum into an IRA, but

first consulted the relevant IRS publications and forms for other options that might allow him more flexibility, short of declaring the entire sum to be 1990 income. As fate would have it, the one year in which the IRS publications and forms were misleading and wrong on this question was in 1990 (for preparing 1989 returns). As a result of this Service misfeasance, Mr. Miller changed his plans and did not execute a rollover of his retirement funds within 60 days. He instead decided to pay taxes on the distribution using income-averaging methods applicable to an extensive array of retirement plan distributions, having been led by the Service publications and forms to believe these methods were also applicable to TSA distributions. Mr. Miller even paid estimated taxes for the rest of 1990 on this basis.

Then, in early 1991, Mr. Miller's TSA plan administrator informed him that income-averaging was not available for TSA distributions. Ironically, the plan administrator referred Mr. Miller to the same Service publications he had relied upon, only by then a corrected version had been published (for preparing 1990 returns). Unsure of his options, and sure only that paying the full tax otherwise due was better than risking the penalties and interest associated with a deficiency assessment, Mr. Miller paid taxes on April 15, 1991 on the basis that the entire distribution was ordinary income in 1990.

In November 1991, Mr. Miller submitted a properly verified tax refund request to the Philadelphia Service Center, the required place to file his refund claim. The request identified two mutually exclusive grounds for the refund, both premised on an IRA rollover: (1) a rollover was still timely because there was no enforceable TSA rollover period

precluding it at that point; or (2) even if there were an applicable rollover period that he had missed, it could and should be extended in his case under Service regulations for extension of time periods, i.e., Treas. Reg. § 1-9100-1 (1970). Each ground for relief was set out with sufficient detailed facts to apprise the Service of its exact basis, as required by Treas. Reg. § 301.6402-2(b)(1). Mr. Miller also made very clear that he was in no way contesting his TSA distribution's lack of eligibility to use income-averaging (also known as Form 4972, special treatment). Rather, he was simply looking for a way to be made whole for his reasonable reliance on erroneous and misleading IRS publications and forms.

Service Response to Mr. Miller

The Service's response to Mr. Miller was the purported notice of disallowance of January 13, 1992, sent to him by the Philadelphia Service Center. App. 35. This notice is the sole basis for the government's claim that this suit is untimely. As the Court of Appeals observed, the notice was unambiguous in certain respects: it correctly identified the tax year, the type of tax, and the amount of refund claimed. App. 4. The letter also included what the court described as "a brief explanation of the reasons for disallowance." *Id.* This statement, however, simply glosses over the question of whether there is any rational nexus between the refund grounds presented and the stated "reasons for disallowance."

That question, however, tied to the record and particular facts of this case, is central to the jurisdictional issue. The "brief explanation" consisted of the following:

> We have disallowed the claim **because** your distribution does not qualify for the Form 4972, special treatment. Since the money you contributed to your TSA, was not taxable when the contributions were made to your TSA. Also, a rollover from a TSA to an IRA must be made within the 60 day period.

App. 35 (emphasis added). In the courts below, the government offered no extrinsic evidence to support its argument that this cryptic "explanation" reflected merits-based consideration of Mr. Miller's grounds for refund. To the contrary, the government rested its untimeliness claim entirely on the face of the notice, even though it was effectively obliged to concede: (1) that the first sentence purported to disallow the refund on a ground **not** presented; (2) that the second "sentence" was not a sentence at all, but perhaps at best an inadvertently disconnected dependent clause of the first, irrelevant sentence; and (3) that the third sentence was not responsive to Mr. Miller's second ground for refund (that the 60-day period could and should be extended in his case).

Mr. Miller Seeks a Merits-Based Decision on His Claim

Following issuance of the purported disallowance, Mr. Miller patiently and exhaustively pursued efforts to get his refund claim before those persons in the Service with the ability to understand his claim and the authority to act on it. He was first referred to the Baltimore District Office. Following a 1993 meeting with Baltimore IRS staff, he was afforded an internal administrative appeal, even though normally appeals are to precede disallowances. By 1994, the Washington Appeals Office had denied his

appeal on the first refund ground, and had advised him to present the second refund ground to the National Office for consideration. By this time, of course, the two-year limitations period that the government now asserts began running on January 13, 1992, had already expired.

Mr. Miller was finally able to obtain a conference with officials in the Employee Plans Division of the National Office in December 1994. This resulted in the submission in January 1995 of his request for an extension of the IRA rollover period in another form, as suggested by the National Office, complete with detailed documentation of his timely journey from one Service office to another to that point. The Director of the Employee Plans Division responded to Mr. Miller by letter of April 25, 1995. App. 37. In contrast to the Service's January 13, 1992 letter, this letter expressly addressed the grounds articulated in Mr. Miller's refund request, rejecting them on the merits. *Id.* The letter, sent more than fifteen months **after** the second anniversary of the Service's January 13, 1992 letter, did not claim that Mr. Miller's request was untimely. In fact, the letter contained no hint of or reference to any pre-existing statute of limitations problem, and to that point, apart from the boilerplate right-to-sue language in the purported notice of disallowance, App. 35, no one in the Service involved in Mr. Miller's case had ever intimated in any way that a two-year "clock" on his claim was ticking or had run out.

Mr. Miller disagreed with the Employee Plans Division's conclusions on the merits and sought reconsideration within the Service. A meeting was held with the Assistant Commissioner for Employee Plans and Exempt Organizations. Thereafter, by letter of November 2, 1995,

the Assistant Commissioner denied Mr. Miller any relief. In this letter, for the first time, the Service, expressly relying on advice of Service counsel, claimed that under section 6532 of the Code it had no legal authority to grant or deny the request and that such authority had effectively lapsed on January 13, 1994, at the end of the two-year period following issuance of its January 13, 1992 letter. App. 41-42. After a brief and inconsequential follow-up meeting with the Assistant Commissioner's staff, Mr. Miller concluded that his long effort to obtain administrative, make-whole relief from the Service's misfeasance without resorting to litigation was at an end. Mr. Miller decided to initiate this action, which began on March 8, 1996, App. 18, i.e., well within two years of the April 25, 1995 letter in which his second ground for relief was first considered on the merits and rejected.

Proceedings Below

The district court heard oral argument on the government's two motions to dismiss: for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. The court declined to rule on the Rule 12(b)(6) motion, but granted the Rule 12(b)(1) motion in a bench ruling following oral argument. App. 33. On appeal, petitioner briefed both the incorrectness of the jurisdictional ruling and the government's undecided Rule 12(b)(6) claim. The government did not defend its Rule 12(b)(6) claim in its answering brief. Petitioner had requested oral argument and the government had acknowledged that while it was not essential it might be helpful to the court. Nevertheless, the Fourth Circuit notified the parties that there would be no oral argument.

The Fourth Circuit issued a *per curiam* decision. App. 1. Petitioner timely filed a petition for rehearing, requesting that the case be placed on the oral argument calendar so that the parties could more fully address the court's evident misconceptions about: (1) when the Service first addressed the merits of Mr. Miller's second ground for refund and (2) the relevance to the limitations issue of the evidence of the Service's multiple failures in Mr. Miller's case to follow its own internal procedures for handling tax refund claims. App. 6. The rehearing request was summarily denied. App. 16.

REASONS FOR GRANTING THE PETITION

Introduction

Absent review by this Court, taxpayers may be forced to bring their tax refund claims to federal court before the Service is obliged to consider them on the merits. This is because the Fourth Circuit has uncritically accepted the government's remarkable and indefensible arguments regarding its responsibility in relation to tax refund claims. Section 6532(a) is a critical component of a statutory scheme that first requires taxpayers to obtain administrative resolution of tax refund claims within the Service before the aid of the federal judiciary may be invoked. Under the decision of the Fourth Circuit in this case, however, an administrative decision on the merits is unnecessary to trigger the running of the § 6532(a)(1) limitations period. Thus, notwithstanding the statutory presentment obligation, the Service is free to shift all or

as much as it sees fit of its vast responsibility for resolution of refund requests to the courts by issuing *pro forma* notices of disallowance, i.e., "disallowances" that are all form and no substance. Of the multitude of taxpayers annually who are denied refunds, only those with the wherewithal, persistence and inclination to sue before obtaining a rational explanation of the denial of their refunds will ever be able to ensure that their refund requests were rejected on the merits. For all the rest, their right to a decision on the merits will be entirely at the mercy of an agency that claimed, in this case, that it owes taxpayers no explanation whatsoever of the actions it takes on their refund requests.

Of course, the freedom of the Service to act in such an arbitrary and oppressive manner was never envisioned by Congress in enacting § 6532 and its related provisions. The Service's extreme position should therefore be repudiated by this Court now, before other federal courts – which have generally understood that in this area form does not triumph over substance – are similarly infected by the Service's views.

The questions presented are important not just because of the number of taxpayers potentially affected, but also because short-term gains to the Service from oppressing taxpayers with *pro forma* notices of disallowance are not the end of the story. Rather, our voluntary system of self-assessment and reporting of taxes is critically dependent on the maintenance of good will and good faith dealings between the taxpayer and the tax collector. This is a delicate balance that, at this writing, Congress is entertaining grave concern the Service has already upset in other ways; it easily could be further

upset absent corrective action by this Court on this important aspect of tax law administration. In short, as is presented in more detail below, the petition should be granted because it meets the criteria of both Rules 10(c) and 10(a) of this Court, and is not an effort to have this Court correct either erroneous factual findings or a misapplication of a properly stated rule of law.

I. THE DECISION BELOW THREATENS THE VITALLY IMPORTANT SCHEME OF FEDERAL TAX COLLECTION, REFUND AND REFUND LITIGATION BY NULLIFYING THE TAXPAYER'S RIGHT TO MERITS-BASED CONSIDERATION BY THE SERVICE OF PROPERLY PRESENTED REFUND CLAIMS

The decision in this case represents a stark and unwarranted departure from what Congress had in mind in enacting detailed, prescriptive limitations periods in connection with tax refund claims. Congress' intent was to force taxpayers to timely present, and for the Service to consider on the merits, whatever bases the taxpayer had for seeking the refund. Code sections 6511 and 7422(a) could not be clearer about this. Only after compliance with § 6511's requirement to timely present his refund claim to the Service is the taxpayer entitled under § 7422(a) to seek the aid of busy federal district courts with tax refund litigation, and, under § 6532(a)(1), the taxpayer must do so promptly, i.e., within two years of receipt of a disallowance on the particular ground presented. The statutory purpose is to ensure that the IRS has adequate notice of the legal and factual bases of the refund claim, so as to permit review and determination

and the correction by the Service of any errors, prior to litigation. *See Bartley v. United States*, 123 F.3d 466, 468 n.3 (7th Cir. 1997).

Inherent in this statutory scheme is Congress' expectation of merits-based disallowances. Thus, unless these requirements are a meaningless charade, the Service's consideration on the merits of a refund claim properly presented to it is the key to the effectiveness of a notice of its disallowance. If this is not apparent from the literal text of § 6532(a)(1), it is only because Congress saw no need to state the obvious: the word "disallowance" implies a rational nexus between request and denial.[1] As a matter of internal policy it seems the Service agrees with this; its internal procedures for handling refund claims are in complete accord.[2] Congress would therefore be shocked at the Service's claim below that, because

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[1] This was clear even under the predecessor provisions to § 6532. *See A. G. Reeves Steel Constr. Co. v. Weiss*, 119 F.2d 472, 476 (6th Cir.), *cert. denied*, 314 U.S. 677 (1941) (purpose of the Code's limitations provisions is to avoid "vexations and expensive litigation and to afford an opportunity to the Treasury to consider the taxpayer's claims and make refund if taxes have been erroneously collected").

[2] The standard Service procedure for denial of a refund claim such as petitioner's is set forth in *First Alabama Bank, N.A. v. United States*, 981 F.2d 1226, 1227 n. 1 (11th Cir. 1993). A more complete description of the IRS income tax refund claim processing standards and procedures, in relation to what occurred or failed to occur in Mr. Miller's case, was provided to the lower courts in the form of an appendix which summarized pertinent parts of the Internal Revenue Manual and attached relevant pages. None of this was disputed by the government. The summary is included in the appendix to this petition. App. 43.

there is no requirement in the Code to provide any explanation to the taxpayer of its actions, a *pro forma* denial is an adequate limitations trigger. Such a standard leaves the Service free to deny claims for undisclosed, arbitrary and capricious reasons, nullifying a taxpayer's right to a merits-based resolution at the Service.

As noted above, tax refund litigation is thoroughly straight-jacketed by statutory procedural requirements tied to full and timely presentation of claims to the Service before resort to the courts may be had. These are rigid, demanding requirements for the taxpayer. But that very inflexibility places a corresponding burden on the Service for decisions on the merits when a claim is fully and properly presented under the detailed requirements of Treas. Reg. § 301.6402-2(b)(1). Only last term this Court rejected a liberalized approach to the limitations period for filing refund claims with the Service, set forth in § 6511, even under compelling equitable circumstances. The Court noted that because the Service issues more than 90 million refunds a year, an equitable tolling exception to § 6511 "could create serious administrative problems." *United States v. Brockamp*, ___ U.S. ___, 117 S. Ct. 844, 852 (1997). By the same token, it is not hard to imagine a serious judicial backlog if the Service were free to issue *pro forma* disallowances, forcing taxpayers to choose between abject surrender and filing in the district court. Even worse, however, would be the unfair burden on taxpayers who would just give up without a judicial resolution of the merits of their claim.

In § 6532(a)(1), Congress also precluded taxpayers from going to federal court with refund claims, in the wake of Service inaction, for a period of six months after

filing. Congress' intent in enacting this waiting period was to give the Service ample time under § 6511 to consider a claim on the merits before it is obliged to defend itself in court. *See DuPont Glore Forgan, Inc. v. AT&T*, 428 F. Supp. 1297, 1301 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978); *Gerrard v. Campbell*, 81 F. Supp. 752, 754 (N.D. Ill. 1949). Congress did not on the one hand give the Service explicit breathing space for consideration of mandatory submissions under § 6511 and render the time period irrelevant on the other hand by giving the Service the freedom to categorically reject refund claims without regard to their merit.

Section 6532(a)(1) is an important component of a federal tax collection system that relies heavily for its workability on individual taxpayers for accurate self-assessment and reporting. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 815 (1984); *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944). Under this system, a taxpayer on his own volition may underassess and underpay the amount due, but does so at his peril. Due to the accrual of penalties and interest, taxpayers generally are well advised to pay first and seek refund later, which is exactly how Mr. Miller proceeded. A critical ingredient to the workability of this kind of voluntary "pay-first-then-adjudicate" system is taxpayer confidence that, after payment, the internal administrative system will produce fair and reasonable adjudication of claims of overpayment, not *pro forma* denials. Absent such confidence, all the incentives are in the wrong direction.

In short, the decision in this case, triggering the two-year limitations period in § 6532(a)(1) with the issuance

of a *pro forma* notice of disallowance by the Service, cannot withstand scrutiny under the Code, and this Court should take this occasion to safeguard taxpayers' critical right to merits-based disallowances. At the urging of the government, the Fourth Circuit placed principal reliance on *dicta* in *Smith v. United States*, 478 F.2d 398 (5th Cir. 1973) App. 4. But the *Smith* court established no rule that *pro forma* notices are sufficient. The *dicta* in *Smith* that a notice is adequate if all it contains is correct information on the taxpayer, tax year, type of tax and amount of refund claimed, 478 F.2d at 399, must be viewed in light of the particularly frivolous taxpayer claim in that case that the notices were "vague and indefinite." *Id.* There is simply no comparison between the trivial claimed defect in the *Smith* notices and the problems with Mr. Miller's notice. Even more fundamentally, unlike this case, *Smith* did not involve a claim that the notice failed to address the merits of the grounds presented for the refund. Finally, *Smith* does not purport to question other cases that have recognized the Service's obligation to address all grounds for refund fully and properly presented in a refund claim in order to trigger the statute. *See* part II, *infra*. The Fourth Circuit did not consider any of these limitations on the scope of the *dicta* in *Smith* in its decision, which simply parrots the government's untenable and extreme argument.

The evident misunderstanding in the lower courts about what Service actions constitute a § 6532(a)(1) limitations trigger makes clear the need for clarification by this Court on this critical component to taxpayers' rights to full and fair processing of tax refund claims by the Service. Indeed, not even the fact that the Fourth

Circuit's decision is unpublished will diminish its significance for future cases if this Court does not intervene. The United States is the only defendant in tax refund litigation, and the result here can only encourage it to assert the defensibility of unresponsive, *pro forma* notices of disallowance in future cases. And with this case extending greatly the *dicta* in *Smith v. United States, supra,* the United States has ample basis under Fourth Circuit Rule 36(c) to cite this case as precedent. Finally, the United States' potential adversaries in future tax refund litigation are also likely to give undue weight to the decision below at a critical moment. Tax practitioners researching the threshold jurisdictional issue under § 6532(a)(1) normally rely on specialized reports that publish all federal tax decisions, including those denominated "unpublished" by the originating court. These reports are not always careful to note court-imposed constraints on a decision's precedential value; in petitioner's case, at least one such report is devoid of any indication that the Fourth Circuit considers the decision unpublished. *Miller v. United States,* 80 AFTR 2d ¶ 97-5074, published July 31, 1997.

II. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISION IN THIS CASE AND THE DECISIONS OF OTHER FEDERAL COURTS THAT RECOGNIZE THAT MERITS-BASED SERVICE CONSIDERATION OF A GROUND FOR A REFUND CLAIM IS ESSENTIAL TO TRIGGER THE TWO-YEAR LIMITATIONS PERIOD IN 26 U.S.C. § 6532(a)(1)

Part I explains why this Court should give plenary consideration to Question 1, strictly on an analysis of the

Fourth Circuit's decision in light of the undisputed record, the relevant Code provisions, and the authority relied upon by that court. Left out of the lower court's decision is any discussion of the many federal court decisions relied upon below by petitioner that are irreconcilable with the approach taken in this case. Resolving the express or implied conflict between this case and those authorities provides an additional basis for this Court to accept Question 1 for review.

Upon full briefing, petitioner will demonstrate that the decision below is a departure from a line of federal court decisions – circuit and district courts and the Court of Federal Claims – which establish the following objective and straightforward test for the effectiveness of a notice of disallowance: one way or another, the notice must on its face reflect that consideration of the grounds properly presented by the taxpayer did take place in issuing it; otherwise, it is not an effective trigger for § 6532(a)(1) purposes unless by extrinsic evidence the Service can demonstrate that it did actually consider and reject all properly presented grounds. *See, e.g., Block-Southland Sportswear Co. v. United States*, 73-2 U.S.T.C. ¶ 9552 (4th Cir. 1973), *aff'g per curiam* 73-1 U.S.T.C. ¶ 9230, (E.D.N.C. 1972) (prerequisites of § 6532(a)(1) are not met when neither the Service's "letter nor the attached Revenue Agent's report contained any language indicating that plaintiff's claim was ever considered. . . . "); *Union Commerce Bank v. United States*, 463 F. Supp. 842, 843-44 (N.D. Ohio 1978), *aff'd*, 638 F.2d 963 (6th Cir. 1981) (notice of disallowance held effective because the taxpayer's claim "was fully considered by the Secretary and disallowed on its merits."); *Schmitt v. Kavanagh*, 91 F.

Supp. 659, 663 (E.D. Mich. 1959) (Service letter stating that the taxpayer's refund claim was rejected in its entirety held insufficient to trigger the statutory limitations period when the underlying facts demonstrated that the Commissioner "has given no consideration whatever to the plaintiff's claim.").

That a decision on the merits is necessary to trigger the statute is also clear from the numerous cases establishing that the two-year period from rejection of a first claim is expanded when a second timely claim is filed alleging different grounds or theories of recovery.[3] *E.g.*, *L&H Co. v. United States*, 963 F.2d 949, 951 (7th Cir. 1992); *Charlson Realty Co. v. United States*, 384 F.2d 434, 439-40 (Ct. Cl. 1967); *W. A. Schemmer Limestone Quarry, Inc. v. United States*, 240 F. Supp. 356, 358 (S.D. Ia. 1964). These cases reflect the logical corollary to the rule that a claim is not disallowed until all the grounds presented are

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[3] To be distinguished are cases where there is a decision on the merits and the taxpayer seeks further consideration on the **same** grounds, whether on the same or additional facts. In these situations, Congress has prescribed that the first decision on the merits triggers the statute. § 6532(a)(4). *E.g.*, *Jones v. United States*, 26 Cl. Ct. 424, 425 (1992); *W. A. Schemmer Limestone Quarry, Inc. v. United States*, 240 F. Supp. 356, 359 (S.D. Ia. 1964) (distinguishing between new information on an old ground and "information amounting to new grounds."). *See Dalton v. United States*, 800 F.2d 1316, 1319 (4th Cir. 1986), *cert. denied*, 481 U.S. 1024 (1987). Mr. Miller's claim is plainly not in this mold, a point he made clear below. Nevertheless, the government relied on § 6532(a)(4) and the Fourth Circuit, in turn, cited to the provision in its decision, App. 4, without comment on Mr. Miller's claim that § 6532(a)(4) does not mean that a § 6532(a)(1) disallowance is sufficient even though not based on the merits of the claim.

expressly disallowed. *E.g., Clinton Trust Co. v. United States*, 52 F. Supp. 671, 679 (Ct. Cl. 1943). Mr. Miller's diligent and timely pursuit of the second ground for his refund claim should certainly not leave him in a worse position than if he had filed separate, seriatim refund claims for each of the grounds he asserted, which he was entitled to do. The decision below has the unintended implication of discouraging taxpayers from including all grounds in their first refund claim.

III. THE COURT SHOULD RESOLVE A CIRCUIT COURT CONFLICT ON THE EVIDENTIARY RELEVANCE OF A SERVICE FAILURE TO FOLLOW ITS OWN INTERNAL RULES AND PROCEDURES IN PROCESSING TAX REFUND CLAIMS

If the Court grants certiorari on Question 1, it should also grant certiorari on Question 2. This case represents a clear conflict in approach between the Fourth and Eleventh Circuits on the question of the relevance – to the factual record underlying a § 6532(a)(1) limitations issue – of the Service's failure to follow its own internal rules and procedures in processing a tax refund claim. Here, neither the facts nor the procedures were in dispute, yet the Fourth Circuit ignored both to issue a decision that cannot be reconciled with the approach taken in *First Alabama Bank, N.A. v. United States*, 981 F.2d 1226, 1230 n.5 (11th Cir. 1993).

The procedures and actions employed by the Service in handling Mr. Miller's refund claim case were a marked departure from the norm – clear internal IRS procedures and standards that require a careful and complete assessment of the merits before a final decision is issued. App.

43-44. The Service had a full six months from November 21, 1991 to consider Mr. Miller's refund request before he could commence suit. 26 U.S.C. § 6532(a)(1). Despite the complex legal and factual questions presented, the Service responded in less than two months. The applicable procedure was for the IRS to issue a **preliminary** notice of disallowance, i.e., a "30-day letter" advising Mr. Miller that he had a brief period in which to commence an administrative appeal. Accompanying the letter should have been a copy of an examiner's report containing a documented, informative statement of reasons for the disallowance, applying "the law in a reasonable, practical manner." App. 43. The Service inexplicably skipped preparation of any such report and hence, any window of opportunity to contest it pre-decision. Instead, the Service quickly issued a decision purporting to be a final notice of disallowance. The Service proffered no extrinsic evidence to contradict this apparent rush to judgment.

Recognizing that he had gotten an unintelligible, unresponsive answer from the Philadelphia Service Center, Mr. Miller requested National Office involvement in his case as early as May 1, 1992. It took more than two additional years to get the National Office involved, whereas the standard procedure is that the National Office is to be consulted on unusual or complex refund questions before a final decision, and denial of a taxpayer request for such a referral is to be in writing, stating the reasons therefor. App. 44. The Service never proffered any explanation for not referring Mr. Miller's claim directly to the National Office, apparently the only Service Office with authority to rule on the second ground for his refund claim.

As previously noted, the Service ultimately provided Mr. Miller an administrative appeal in the Washington, D.C. Appeals Office. In the normal course, however, such appeals are to **precede** a statutory notice of disallowance, not **follow** it by two years or more. *See First Alabama Bank, N.A. v. United States, supra,* 981 F.2d at 1227 n.1; App. 43-44. As Mr. Miller's claim was bounced from office-to-office within the Service from late January 1992 until long after the second anniversary of the issuance of the purported notice of disallowance, no one in the Service with whom Mr. Miller dealt intimated orally or in writing that the two-year period for bringing suit was running or had run. In fact, under the Service's lack-of-authority theory advanced for the first time on November 2, 1995, App. 41 – almost 22 months after the clock had ostensibly run out – all of the letters, meetings and discussions with various Offices during that 22 months were a nullity that should never have taken place at all.

In the lower courts, petitioner discussed these events in light of generally applicable processing procedures to provide context to his claim that prior to April 1995, there had been no genuine disallowance of his second ground for refund. The government mischaracterized this as a claim that petitioner sought to invoke procedural or substantive rights from internal IRS procedures. This straw-man restatement of his claim was thereafter repeated by the Fourth Circuit in its decision. App. 5. This misapprehension of petitioner's claim was one of two grounds for relief set forth in the petition for rehearing. App. 7, 12-14.

Petitioner's reference to the internal processing of his refund request was grounded in *First Alabama Bank, N.A.*

v. United States, supra, which held that a taxpayer in a refund suit may invoke the Service's failure to follow its own rules and procedures as evidence "that what in fact transpired was not" what the Service claimed it to be. 981 F.2d at 1230 n.5. The legal standard applied in *First Alabama* was whether there is any

> reasonable confusion on the part of the tax payer as to the effect of the original . . . notice[ ] of disallowance.

Id. First Alabama itself drew a distinction between the evidentiary value of departures from the normal mode of processing and the principle that the Service's "intra-agency operating procedures [are] not judicially enforceable against the agency [and] do not delineate substantive rights of individuals." *Id.* The Fourth Circuit's adoption of the government's argument and its rejection of petitioner's rehearing petition lead inescapably to the conclusion that the Fourth Circuit's handling of this issue is in conflict with the treatment it would have been afforded in the Eleventh Circuit.[4]

The government also characterized petitioner's reference to the historical record as an improper attempt to interject equitable tolling principles to defeat the limitations period. This was another misrepresentation of Mr.

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[4] The Eleventh Circuit also noted that courts may force agencies to follow even internal procedures where the rights of individuals might otherwise be affected. 981 F.2d at 1230 n.5 (citing *Morton v. Ruiz,* 415 U.S. 199, 235 (1974)). The Fourth Circuit's decision in this case does not even acknowledge this limit to its refusal to allow petitioner to delineate the Service's acts and omissions in his case.

Miller's position uncritically accepted by the Fourth Circuit. App. 4. In fact, Mr. Miller consistently relied upon the "reasonable confusion" standard of *First Alabama*, a case in which the Eleventh Circuit expressly rejected the taxpayer's equitable tolling argument even as it considered and ruled upon what it regarded as the distinct, fact-based claim of whether the purportedly final notice of disallowance was in fact final. 981 F.2d 1228-30.[5] If, as petitioner demonstrated factually, there was no genuine disallowance until April 1995, no "tolling" is necessary, equitable or otherwise.

The question presented by the conflict between this case and the foregoing authorities is set forth above as petition Question 2. This is an important corollary to question 1, in that it presents a closely related issue where the Service is similarly seeking to exalt form over substance. Taxpayers must be able to employ a normal arsenal of fact-based argument in relevant context to penetrate formalistic responses. Otherwise, a taxpayer-favorable resolution of Question 1 might prove to be a hollow victory.

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[5] In the same vein, other courts have conducted straightforward factual assessments of the course of dealing between the taxpayer and the Service to resolve limitations questions in the taxpayer's favor without resort to equitable tolling principles. *E.g., Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 326 (6th Cir. 1990); *Southeast Bank of Orlando v. United States*, 676 F.2d 660, 664 (Ct. Cl. 1982); *Beardsley v. United States*, 126 F. Supp. 775 (D. Conn. 1954).

CONCLUSION

The Court should grant the writ of certiorari to settle two important federal questions relating to the meaning and operation of 26 U.S.C. § 6532(a)(1) that it heretofore has not addressed and to resolve the conflicts that the decision below creates with the decisions of other federal courts, including circuit courts, district courts and the Court of Federal Claims, on these questions.

Respectfully submitted,

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INDEX TO THE APPENDIX

Page

Opinion of the U.S. Court of Appeals for the Fourth Circuit affirming dismissal (July 11, 1997) ..... App. 1

Appellant's Petition for Rehearing (August 20, 1997) ..... App. 6

Order of the Fourth Circuit denying Petition for Rehearing (November 24, 1997) ..... App. 16

Mandate of the Fourth Circuit (December 2, 1997) ..... App. 17

Complaint, U.S. District Court for the District of Maryland (March 8, 1996) ..... App. 18

Bench Decision of U.S. District Judge Walter E. Black, Jr. (November 8, 1996) ..... App. 25

Final Judgment of the U.S. District Court (November 8, 1997) ..... App. 34

Internal Revenue Service Letter to A. Eugene Miller (January 13, 1992) ..... App. 35

Internal Revenue Service Letter to David W. Brown (April 25, 1995) ..... App. 37

Internal Revenue Service Letter to David W. Brown (November 2, 1995) ..... App. 41

Plaintiff's district court Appendix A to Opposition to Motion to Dismiss – Standard IRS Income Tax Refund Claim Processing Standards and Procedures ..... App. 43

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

A. EUGENE MILLER *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA. *Defendant-Appellee.*	)	No. 96-2787

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Walter E. Black, Jr., Senior District Judge.
(CA-96-716-B)

Submitted: June 30, 1997

Decided: July 11, 1997

Before MURNAGHAN and HAMILTON,
Circuit Judges, and PHILLIPS,
Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

David W. Brown, Norman G. Knopf, KNOPF & BROWN, Washington, D.C., for Appellant, Loretta C. Argrett, Assistant Attorney General, Richard Farber, Paula K. Speck, Lynne A. Battaglia, United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Miller appeals from the district court's order dismissing his tax refund suit for lack of subject matter jurisdiction because he failed to file his suit within the two-year statute of limitations provided by I.R.C. § 6532(a).* We affirm.

In February 1990, Miller received a lump-sum distribution from his tax sheltered annuity (TSA) in the amount of $168,028.40. He did not roll over any part of the distribution into an Individual Retirement Account (IRA). *See* I.R.C. § 403(a). In April 1991, after learning that the distribution did not qualify for ten-year averaging, Miller paid the income taxes due for 1990 on the entire distribution. In November 1991, Miller filed an amended 1990 income tax return (Form 1040X) along with a six-page letter requesting a refund of the taxes paid so that he could roll over the distribution to his IRA.

The Director of the IRS's Philadelphia Service Center sent Miller a certified letter, dated January 13, 1992, notifying him that his claim was disallowed and stating, "If you want to bring suit to recover tax, penalties, or other amounts, you may do so by filing with the United States

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* All section references are to the Internal Revenue Code as amended and in effect for the tax year at issue.

District Court. . . . The law permits you to do this within two years from the mailing date of this letter." Miller wrote back to the IRS reiterating his contention that he should be allowed to roll over the distribution and requested a meeting with IRS officials. The IRS wrote back to Miller on February 21, 1992, inviting him to call the Philadelphia office or the local IRS office if he had any further questions, and reminding Miller that, "As stated in our previous letter, you may bring suit in a United States District Court or a United States Claims Court." Miller and the IRS continued a series of letter exchanges throughout 1992 and 1993, along with a letter ruling request filed by Miller's attorney in January 1995. The IRS responded to the letter ruling request with a letter dated April 25, 1995, stating that the 60-day rollover period did apply to Miller's TSA distribution (*see* I.R.C. §§ 402(a)(5)(C), 403(a)(4)(B)); that the IRS had no statutory discretion to extend the 60-day time period; and that Miller's TSA distribution was not eligible for ten-year averaging.

After another meeting with IRS officials, the Assistant Commissioner for Employee Plans and Exempt Organizations sent Miller's attorney a letter dated November 2, 1995, stating: "Counsel advises that I have no legal authority to grant or deny your claim after the expiration of a two year period following the notice of disallowance (*See* section 6532 of the Internal Revenue Code)." Miller filed a suit for refund of taxes on March 8, 1996. The district court dismissed the suit for lack of subject matter jurisdiction under I.R.C. § 6532(a) because it was not filed within two years of the notice of disallowance. Miller appeals.

A taxpayer must bring a suit for a refund within two years from the mailing date of the notice of disallowance of a refund claim. I.R.C. § 6532(a)(1). Except in limited circumstances not present here, compliance with the time provisions of § 6532(a) are jurisdictional. *See Webb v. United States*, 66 F.3d 691 (4th Cir.1995) (equitable tolling principles do not apply to tax refund suits), *cert. denied*, ___ U.S. ___, 65 U.S.L.W. 3584 (U.S. Feb. 24, 1997) (No. 95-1360). Once the IRS mails a notice of disallowance, "any consideration, reconsideration, or action by the Secretary" with respect to the taxpayer's claim for a refund does not toll the running of the two-year statute of limitations. I.R.C. § 6532(a)(4). Rather, an extension of the limitations period must be agreed to in writing between the taxpayer and the IRS. I.R.C. § 6532(a)(2). It is undisputed that Miller never entered into a written agreement with the IRS to extend the two-year period.

Miller maintains, first, that the January 13, 1992, letter was insufficient to trigger the limitations period because it did not properly address each of the arguments in his refund claim. Our review of the record discloses that this claim is without merit. The notice sent to Miller was unambiguous in informing him of the Commissioner's disallowance of his refund claim – the tax year, type of tax, and amount of refund claimed were all identified, and the letter included a brief explanation of the reasons for disallowance. *See Smith v. United States*, 478 F.2d 398, 399 (5th Cir. 1973) ("So long as the taxpayer receives adequate notice of the Commissioner's disallowance, no particular form of notice is necessary to start the running of the period of limitations.").

Next, Miller claims that the Commissioner's failure to send him a "Thirty-Day Letter," as recommended by the Internal Revenue Manual, rendered his notice of disallowance ineffective. However, it is well-settled that Internal Revenue Manual provisions do not confer procedural or substantive rights upon taxpayers. *See United States v. Caceres*, 440 U.S. 741, 752-53 (1979); *Smith v. United States*, 478 F.2d at 400. Therefore, this claim fails as well.

Accordingly, we affirm the district court's order dismissing Miller's suit. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DOCKET NO. 96-2787

A. EUGENE MILLER,

Plaintiff/Appellant,

v.

UNITED STATES OF AMERICA,

Defendant/Appellee.

PETITION FOR REHEARING

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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Counsel for Appellant

INTRODUCTION

Appellant, A. Eugene Miller, through undersigned counsel, respectfully petitions the Court for rehearing of the above-captioned appeal pursuant to Rule 40 of the Federal Rules of Appellate Procedure. In counsel's judgment, the Court's unpublished per curiam opinion of July 11, 1997 overlooks material factual or legal matters. Specifically:

1. Contrary to the Court's assessment of the facts, Decision at 4, the notice of disallowance sent to Mr. Miller did not contain an explanation of the reasons for disallowance of Mr. Miller's tax refund claim. Two independent, mutually exclusive grounds for the refund were presented, and the notice plainly fails even to mention, let alone address, the second of these.

2. The Court states that Mr. "Miller claims that the Commissioner's failure to send him a 'Thirty-Day letter' as recommended by the Internal Revenue Manual, rendered his notice of disallowance ineffective." Decision at 4. Mr. Miller has made no such claim. The Court has mistakenly reiterated the Government's mischaracterization of his claim and has therefore failed to come to grips with his real claim – that the entire course of dealings between Mr. Miller and the Internal Revenue Service ("IRS" or "Service") raises triable issues of jurisdictional fact.

ARGUMENT

The Court has elected to dispense with oral argument and dispose of this case in a brief, per curiam opinion.

Appellant had requested oral argument and the Government had acknowledged that while it did not consider it "essential," it "might be helpful to the Court." Gov. Br. 33. Oral argument would certainly have allowed counsel for appellant to highlight the factual and legal misconceptions that animate the Court's decision, which draw directly upon the Government's bald mischaracterization of the record and of Mr. Miller's claims.

I. THE COURT HAS MISTAKENLY CONCLUDED THAT THE NOTICE OF DISALLOWANCE ADDRESSES BOTH OF MR. MILLER'S GROUNDS FOR A TAX REFUND

The Court rejects as "without merit" the claim that the letter sent to Mr. Miller "was insufficient to trigger the limitations period because it did not properly address each of the arguments in his refund claim." Decision at 3. According to the Court, this is the correct result because, in addition to correctly identifying the tax and refund amounts, "the letter included a brief explanation of the reasons for disallowance." *Id.* at 4.

This assessment is factually incorrect and, as a result, legally erroneous. The "explanatory" part of the notice reads as follows:

> We have disallowed the claim **because** your distribution does not qualify for the Form 4972, special treatment. Since the money you contributed to your TSA, was not taxable when the contributions were made to your TSA. Also, a rollover from a TSA to an IRA must be made within the 60 day period.

(JA 90) (emphasis added). The language employed in this paragraph is plainly and unambiguously directed at explicitly rejecting Mr. Miller's refund claim on a ground he never presented, *i.e.*, entitlement to use ten-year averaging (Form 4972). App. Br. 23; Reply Br. 19-20. Given this obvious mistake by the Service, one would expect the Court to give no credence to this "explanation" in determining whether Mr. Miller's grounds have been subject to "disallowance," as that term is to be understood in 26 U.S.C. § 6532(a)(1). But the Court's decision does not even acknowledge that the facts squarely present an obvious dichotomy between claim and response.

Ignoring the prospect that the "disallowance" as a whole is defective, the Government attempted to justify the explanation on the basis of the third sentence as if it existed in isolation from the rest of the paragraph. But even under this overly indulgent approach, the "explanation" still squarely presents a fact-dependent "disallowance" issue that the Court's decision fails to acknowledge, let alone come to grips with. Mr. Miller's refund grounds were: (1) no rollover period exists because there is no regulation prescribing one; and (2) even if a rollover period exists, it is not statutory and may be extended at the discretion of the Commissioner in a appropriate case, and his is such a case. Reply Br. 20. The district court, though it reached the wrong legal conclusion about the significance of the omission, clearly understood that the "Also" sentence in the notice was not responsive to Mr. Miller's claims, and Government trial counsel did not dispute this assessment. App. Br. 9.

The Court's failure to acknowledge and deal with the obvious defects in the "explanation" trivializes a case

squarely presenting the issue of what constitutes the essential elements of a notice that merits treatment as a "disallowance" as Congress employed that term. Mr. Miller has never asserted that for a purported "disallowance" to be effective for limitations purposes, it must "fully discuss" the taxpayer's grounds; that is one of the numerous Government straw-man mischaracterizations of his claims. Rather, his claim is that the notice must, one way or another reflect on its face that consideration of the grounds presented did take place in issuing it. Reply Br. 8, 10-11. If the "disallowance" fails this simple test, it is unworthy of recognition as such under § 6532(a)(1) unless the Service can establish actual consideration and rejection of the ground, apart from the omission in the notice. Reply Br. 17-18. In this case, the Service is conspicuously silent on whether the merits were resolved in issuing the notice, raising, at a minimum, triable issues of jurisdictional fact. *Id.* at 21-23.

The Court's opinion does not deal with this simple and straightforward standard for evaluating a disallowance. Instead the court cites *Smith v. United States*, 478 F.2d 398, 399 (5th Cir. 1973), a case relied upon heavily by the Government. Decision at 4. But the cited dicta in *Smith* is unhelpful in deciding this case because *Smith* involved a disallowance with only a trivial asserted defect, not the sort of fundamental, facially obvious mismatch between ground-for-claim and ground-for-disallowance present here. App. Br. 32-33. But regardless of how indulgent a standard the Court applies to purported disallowances, nothing can alter the fact that the "disallowance" in this case is completely silent on the request

for a discretionary extension of the rollover period – Mr. Miller's second ground for refund.

If this defect in the notice were overlooked, the IRS could routinely reject multiple-ground refund claims on the basis of any one ground presented, and ignore the other grounds. Such an outcome would be inconsistent with the many cases that have established that the two-year period from rejection of a first claim is expanded when a second timely claim is filed alleging a different ground for recovery. App. Br. 31. Mr. Miller cannot be deemed worse off, having filed, simultaneously with his first ground, a second ground that is just as unconsidered and unrejected as if he had elected to file it instead long after the notice issued (which, in this case, he could have done well within the two-year period).

If the Court concludes, as it should, that at a minimum there are triable issues of jurisdictional fact regarding disallowance of the second ground for relief, it would also be justified in concluding that there are triable issues on the first ground as well. Mr. Miller acknowledges, however, that his case is more compellingly clear on the second ground, because, by being extraordinarily indulgent of ambiguous notices, the Court could conceivably conclude that the tagalong third sentence can be viewed as at least indirectly rejecting Mr. Miller's first ground, *i.e.*, that there is no rollover period specified by regulation. But this only highlights the glaring omission of any rejection of the second ground, *i.e.*, the discretionary rollover extension, which the Government lamely tries to explain with *post hoc* rationalization. Gov. Br. 17. The

Government's preference for excuses over facts is understandable: subsequent events revealed that the office issuing the "disallowance" (the Philadelphia Service Center) had neither the expertise nor the authority to act on the extension request; it was finally handled at the National Office. App. Br. 12-16.

In the final analysis, the merits of Mr. Miller's tax refund claim, as pursued on appeal, implicate the second ground for relief only, not the first ground. App. Br. 42-49. Hence, notwithstanding Mr. Miller's belief that the first ground for relief was not considered and rejected in the purported disallowance, part I of this petition for rehearing is directed solely at the Court's most clear-cut factual error regarding the purported "disallowance;" *i.e.*, its statement that the purported "disallowance" contained an explanation of reasons that the Court apparently believes was inclusive of both grounds for the refund claim. The record actually discloses (or, equivalently, raises triable issues of jurisdictional fact) that Mr. Miller's request for a discretionary extension of the rollover period was not considered and was not made the subject of a legally cognizable "disallowance" in January 1992; such a notice did not issue until April 1995. The Court should therefore grant rehearing on the question of the inadequacy of the notice as a limitations trigger.

II. THE COURT HAS MISAPPREHENDED MR. MILLER'S CLAIM REGARDING OTHER SERVICE ACTS OR OMISSIONS

The Court has also misapprehended Mr. Miller's claim as it related to matters outside the limited purview

of the notice of disallowance and the events leading to its issuance. Relying on further mischaracterization by the Government, Gov. Br. 30-31, the Court states that Mr. Miller claims that the Service's failure to send him a "Thirty-Day Letter, as recommended by the Internal Revenue Manual, rendered his notice of disallowance ineffective." Decision at 4. The Court will find no such claim in Mr. Miller's Brief. Nothing Mr. Miller has said at any point is in conflict with the Court's observation that the Internal Revenue Manual does not confer procedural or substantive rights on taxpayers. *Id.*

What the Court's decision does is mistakenly knock down the Government straw-man rather than address Mr. Miller's actual claim. He clearly and unambiguously relies on *First Alabama Bank, N.A. v. United States*, 981 F.2d 1226 (11th Cir. 1993), not to assert procedural or substantive rights, but rather to invoke the Service's failure to follow its own rules and procedures as evidence "that what in fact transpired was not" what the Service claimed it to be. *First Alabama, supra*, 981 F.2d at 1230 n.5. App. Br. 38 & n.14. The legal standard to be applied is whether there is any

> reasonable confusion on the part of the taxpayer as to the effect of the original . . . statutory notices of disallowance.

981 F.2d at 1230 n.5.

Mr. Miller's Opening Brief discusses this and similar "reasonable confusion" cases and applies this standard not to the thirty-day letter or any other event in isolation, but to the entire course of dealing between him and the Service, before and after issuance of the notice, to show

that the purported notice of disallowance was not regarded as such by him or the Service. App. Br. 33-42. In such an evaluation, departures from the normal mode of processing have obvious evidentiary value in determining what happened, wholly apart from the lack of any taxpayer "rights" associated with processing norms. *First Alabama* recognized this, and explicitly contrasts the evidentiary rule with its complementary belief that the Service's "intra-agency operating procedures" are "not judicially enforceable against the agency" and "do not delineate substantive rights of individuals." 981 F.2d at 1230 n.5.

This Court, of course, may not consider itself obliged to follow *First Alabama*, to give any credence to processing abnormalities in assessing the "reasonable confusion" issue, or even to accept the "reasonable confusion" standard. But by accepting at face value the Government's flagrant mischaracterization of Mr. Miller's claim, the Court has avoided these issues in a way that simply cannot withstand scrutiny. The Court should grant the petition so that it may decide the claim Mr. Miller actually raised, not claims the Government would prefer to answer.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the Court grant the petition for rehearing. In light of the record and the Government's approach to this case, Appellant believes that oral argument is more essential than ever to a proper resolution of this case.

Appellant accordingly requests that the Court, in granting the petition, schedule the case for oral argument.

Respectfully submitted,

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August 20, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 24, 1997

No. 96-2787
CA-96-716-B

A. EUGENE MILLER

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA

Defendant-Appellee

ORDER

The appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 2, 1997

No. 96-2787
CA-96-716-B

Miller v. US

MANDATE

The judgment of this Court dated 7/11/97 takes effect today.

PATRICIA S. CONNOR
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

A. EUGENE MILLER 6433 Weems Avenue Fairhaven, Maryland 20754, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. B-96-716 (Filed Mar. 8, 1996)

COMPLAINT FOR REFUND OF INCOME TAXES

Plaintiff, A. Eugene Miller, by his counsel, Knopf & Brown, alleges, upon knowledge, information and belief as follows:

1. Plaintiff brings this action pursuant to § 7422 of the Internal Revenue Code, 26 U.S.C. § 7422, for refund of income taxes paid for calendar year 1990.

2. Plaintiff A. Eugene Miller is a citizen of the state of Maryland, residing at 6433 Weems Avenue, Fairhaven, Maryland 20754.

3. Defendant is the United States of America.

4. This Court has subject matter jurisdiction under 28 U.S.C. § 1346(a)(1).

5. Venue is proper in this district under 28 U.S.C. § 1391(e)(3) in that plaintiff resides in this district.

6. Plaintiff retired in 1989 from the Insurance Institute for Highway Safety. As an Institute Vice-President

for seventeen years, plaintiff participated in a tax-sheltered annuity (TSA), funded in significant part with his own contributions over a period of many years.

7. Subsequent to retirement, plaintiff planned to roll over all or most of his TSA into one or more of his Individual Retirement Accounts (IRA's). Accordingly, plaintiff elected to receive a lump-sum distribution of the entire amount in his TSA. Plaintiff received a check for $168,028.47 in February 1990, from Prudential Asset Management Company, which administered his TSA. Prudential did not at that time advise plaintiff of any options for postponing or reducing 1990 taxation on the distribution.

8. Prior to actually rolling over this total TSA distribution, plaintiff, who had always prepared his own income tax returns with little or no difficulty, first consulted then-available Internal Revenue Service (IRS) forms and publications relevant to a review of all available options for disposition and taxation of his distribution. Based upon this inquiry, plaintiff was led to the reasonable and logical conclusion that his TSA distribution was eligible for special ten-year averaging, using Form 4972.

9. Plaintiff's conclusion was reasonable and logical. Plaintiff did not find out until indirectly informed by Prudential in January 1991 that the IRS information, on which his decision was based, was wrong. Plaintiff had relied upon then-current IRS Form 4972 and Publications 571 and 575 (1989 tax year versions), which later proved to contain information that misstates the applicable tax law. Indeed, any reasonable person, giving the same careful perusal to these documents as did plaintiff, could only

have reached the same reasonable conclusion that plaintiff reached.

10. The problem with the IRS documents relied upon by plaintiff persisted for only the year in which plaintiff consulted them. Had plaintiff, for example, received his TSA distribution in either 1989 or 1991, and made in either of those years the same inquiry into the then-current versions of the same IRS form and publications, he would not have been led to believe that the use of special ten-year averaging was applicable to his TSA distribution.

11. Acting on the reasonable belief that he could use Form 4972, plaintiff elected not to roll over all or any part of his TSA distribution into one or more of his IRA's in 1990. Accordingly, he paid estimated tax during 1990 that would have been due under ten-year averaging. Plaintiff concluded that although his total tax liability for 1990 would be higher this way than using IRA rollovers, he preferred to pay more in exchange for the greater flexibility he would have in use of the TSA distribution funds.

12. In 1991, after being advised by Prudential that he could not utilize special ten-year averaging, and unsure of the continued availability of either this option or the rollover option, plaintiff paid in full the remainder of his 1990 income taxes on April 15, 1991 reporting and paying taxes on, *inter alia*, the entire $168,028.47 TSA distribution.

13. After exhaustive research as to his rights and in consultation with counsel, on November 22, 1991, plaintiff submitted a 1040X to IRS for 1990 along with an

explanatory letter. Plaintiff sought a tax reduction of $35,894 for 1990, upon the condition that he roll over over $108,528 of his TSA distribution. This request was based on the alternative grounds that (a) the rollover was timely because IRS had failed to promulgate a time period by regulation for total TSA lump-sum distributions, citing 26 U.S.C. § 403(b)(8)(C), or (b) this was an appropriate case for extension of the rollover period, pursuant to IRS Regulation 1.9100.1. The letter extensively documented the request and discussed the equitable and other criteria that govern requests of the type governed by Regulation 1.9100.1.

14. On January 13, 1992, IRS sent plaintiff a letter purporting to be a disallowance of his claim. The letter, however, did not address the merits of either of the grounds presented by plaintiff for the claim; instead, the denial was based on the IRS' erroneous belief that plaintiff was trying to rely on special ten-year averaging and Form 4972. Plaintiff pointed out this error to IRS in a responsive letter of January 27, 1992, to which another non-responsive letter was sent by IRS on February 21, 1992.

15. Thereafter, in an effort to resolve this matter on the merits with IRS without resort to litigation, plaintiff diligently pursued his claims with the IRS through appeal and other administrative mechanisms. During this process, plaintiff also timely filed a revised 1040X for 1990 on April 11, 1994, increasing the requested refund to $47,418, based upon a proposed rollover of $149,078. IRS has never responded to this revised 1040X.

16. Plaintiff's claim underlying his first 1040X refund request relying on § 403(b)(8)(C) of the Code, which did not specify an IRA rollover period for TSA distributions, was denied for the first time by letter of May 11, 1994 from the Washington Appeals Office of IRS. This denial was legally erroneous.

17. Plaintiff's claim underlying his first 1040X refund request relying on Regulation 1.9100.1 was bounced from office-to-office within IRS, starting with the Philadelphia Service Center, then the Baltimore District Office, the Washington Appeals Office and finally the National Office. At the Baltimore District and Washington Appeals Offices, plaintiff had face-to-face meetings with IRS personnel who, while favorably disposed to grant him relief, invariably referred the matter on to other offices for further action. Even the National Office characterized Mr. Miller as a "sympathetic taxpayer." Following a meeting with National Office staff on December 13, 1994, and pursuant to their suggestion, plaintiff's claim was resubmitted in the form of a letter ruling request to the Assistant Commissioner, Employee Plans and Exempt Organizations, on January 11, 1995. The request was denied by letter of April 25, 1995.

18. In the period from April 25, 1995 to the present, plaintiff has sought unsuccessfully to persuade the Assistant Commissioner, Employee Plans and Exempt Organizations, to reverse the decision issued on that date.

19. Plaintiff has overpaid his federal income taxes for the year 1990 because IRS has erroneously refused to allow him a refund conditioned upon IRA rollover on either of the grounds set forth in his refund requests.

20. The denial of plaintiff's first 1040X refund request and defendant's failure to act on plaintiff's second 1040X refund request were erroneous and arbitrary, in that the requests were conditioned upon rollovers that either (a) were not untimely when requested because no rollover period had been prescribed by regulation, as required by § 403(b)(8)(C) of the Code; or (b) were allowable pursuant to Regulation 1-9100-1 and its successors, because no rollover period is expressly prescribed by law and because plaintiff otherwise demonstrated that he satisfied all the criteria for relief under Regulation 1.9100-1.

21. Plaintiff has paid the disputed taxes in full and on time.

22. Plaintiff has filed timely refund claims for the disputed taxes. Plaintiff has initiated a timely refund suit for the disputed taxes. Plaintiff is the sole owner of the refund claims at issue, and has made no assignment of such claims.

WHEREFORE, plaintiff respectfully requests that the Court enter judgment against the defendant and:

(a) award plaintiff $47,418 plus interest or $35,894 plus interest;

(b) direct defendant to accept plaintiff's second or first claim for refund of 1990 taxes, conditioned upon the IRA rollover described in such claim;

(c) Award reasonable attorneys' fees and the costs of this proceeding to plaintiff; and

(d) grant such other and further relief as may seem just and proper to this Court.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury of any issue triable of right by a jury in this action.

Respectfully submitted,

/s/ Norman G. Knopf
Norman G. Knopf

KNOPF & BROWN
1050 Seventeenth Street, N.W.
Suite 1200
Washington, D.C. 20036
Telephone: (202) 785-8200

Attorneys for Plaintiff

March 8, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

A. EUGENE MILLER,	*	Case No. B-96-716
Plaintiff,	*	
v.	*	101 W. Lombard Street
UNITED STATES OF AMERICA,	*	Baltimore, MD 21201
	*	November 8, 1996
	*	10:30 a.m.
Defendant.	*	

****

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE WALTER E. BLACK, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: DAVID BROWN, ESQUIRE
1050 17th Street, N.W.
Suite 1200
Washington, DC 20036

For the Defendant: JAMES J. WILKINSON, ESQUIRE
U.S. DEPARTMENT OF JUSTICE
P.O. Box 227
Trial Attorney-Tax Division
Washington, DC 20044

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Abingdon, MD 21009
(410) 515-7036

[p. 65] THE CLERK: Please rise. This Honorable Court now stands in recess.

(Recess.)

THE CLERK: Please rise. This Honorable Court now resumes its session.

THE COURT: Counsel, I will rule on this matter today by means of an informal oral opinion reserving the right to edit that opinion if it is transcribed for any reason.

Presently pending before the Court is Defendant United States' motion to dismiss Plaintiff's complaint, it is Paper 9 in the court file. In February 1990, plaintiff, A. Eugene Miller, received a $168,028 distribution from a tax sheltered annuity, a TSA. Rather than rolling this distribution over into other investments, plaintiff consulted IRS forms and publications that led him to believe he could utilize a special 10 year averaging. In early [p. 66] 1991, Miller was informed that he could not utilize 10 year averaging. Subsequently on April 15, 1991, he paid taxes on the entire distribution with the intent of seeking a refund upon the condition that he rollover $108,528 of the distribution.

On November 22, 1991, Miller submitted a claim for refund to the IRS seeking a refund of income taxes for calendar year 1990 in the amount of $35,894. The IRS

issued a notice of disallowance of Miller's claim on January 13, 1992. On March 6th – excuse me, on March 8, 1996, Miller filed a complaint for refund of income taxes in this court. Defendant, United States of America, filed the present motion on July 22, 1996 and asserts that the complaint must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the basis that the complaint was filed more than two years after the issuance of the notice of disallowance, and therefore is barred by the two year of statute of limitations periods in 26 USC Section 6532(a).

In the alternative, defendant contends that the complaint must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because the Commissioner of the IRS is without authority to permit a rollover to be made at this time since plaintiff did not comply with the 60 day rollover period prescribed by 26 United States Code Section 403(b)(8)(c). Miller opposes the motion on both grounds.

[p. 67] With respect to defendant's statute of limitations defense, Miller contends that the notice of disallowance was ineffective, and therefore did not trigger the limitations period. Miller maintains that the notice was ineffective for three reasons: One, because the IRS did not send a 30 day letter before issuing the notice of disallowance; two, because the IRS had not yet considered the merits of plaintiff's two grounds for relief; and three, because after the notice of disallowance was issued, Miller believed it was withdrawn for reconsideration.

Further, Miller asserts that at minimum, he has established a disputed issue of fact as to jurisdiction that ought

to be resolved by a jury. As to defendant's rule 12(b)(6) ground for dismissal, Miller asserts that the former Section 403(b)(8)(c) does not expressly prescribe a rollover period for tax sheltered annuities, and either that the 60 day rollover period does not apply or that the IRS Commissioner has discretion to allow the rollover pursuant to the Treasury regulation 301.9100-1. In addition, Miller asserts that it would be an abuse of this discretion for the Commissioner to refuse to exercise his discretion in Miller's favor by granting his refund.

Sovereign immunity principles dictate that, "The United States as sovereign is immune from suit, save as it consents to be sued. And the terms of its consent to be [p. 68] sued in any court define that Court's jurisdiction to entertain that suit." I am quoting from *United States v. Teston*, 424 US 392 at 399, 1976, which in turn is quoting *United States v. Sherwood*, 312 US 584 at 586, 1941. Also citing *Webb v. United States*, 66 F.3d 691 at 693, Fourth Circuit, 1995.

"The statute of limitations requiring that a suit against the Government be brought within a certain time period constitutes a condition on the Government's waiver of immunity." *United States v. Motez*, 476 US 834 at 841, 1986. As such, the statute of limitations should be "construed strictly in favor of the sovereign and not in large beyond what the statutory language requires." Quoting from *Webb* at 693 which in turn is quoting from *Ruckleshouse VCR Club*, 463 US 680 at 685, 1983.

Indeed, statutes of limitations are construed more strictly in favor of the Government in tax cases than in other cases, referring to *Webb* at 698 and 99, concluding

that a rebuttal presumption of equitable tolling which the Supreme Court had applied in a Title VII suit against the Government in *Irwin v. Department of Veterans Affairs*, 498 US 89, 1990, is not applicable in tax refund suits because of the well established significance of statutes of limitations in tax cases and the limited relevance of equitable principles in such cases.

[p. 69] Miller filed his claim pursuant to the civil actions for refund provisions of the Internal Revenue Code, 26 United States Code, Section 7422. Section 6532(a)(1) of the Code contains a two year limitations period. It requires a taxpayer suing for refund under Section 7422(a) to bring suit within two years from the date a notice of disallowance was mailed. This limitations period cannot be easily breached. Quoting, "The taxpayers's inadvertence, neglect or application for reconsideration of an administrative disallowance will not toll the statute. Moreover, the IRS' reconsideration and affirmance of a disallowance will not suffice to extend the time." Quoting from *Dalton v. United States*, 800 F.2d 1316 at 1319, Fourth Circuit, 1986.

The Code itself provides that "any consideration, reconsideration, or action by the IRS following the mailing of a notice of disallowance shall not operate to extend the period within which suit may be begun." Quoting from Section 6532(a)(4). "Nevertheless, the Government may be precluded from relying on this limitations period on equitable grounds under certain circumstances," citing *Dalton* again. "For example, equitable estoppel has been applied against the Government when during the time that the two year limitations period was already running, the IRS incorrectly informed the taxpayer in writing that

the [p. 70] taxpayer had two years from the mailing date of a later disallowance notice in which to file suit." See, for example, *Southeast Bank of Orlando v. United States*, 676 F.2d 660 at 661, Court of Claims, 1982; and *Heath v. United States*, 219 Court of Claims 582, 1979. Equitable estoppel has also been implicated when a notice of disallowance was issued after the taxpayer signed "waiver of notice of disallowance," in circumstances where the taxpayer's claim was not timely according to the date the waiver was signed, but was timely according to the date the notice was mailed. See, for example, *Exchange and Savings Bank of Berlin v. United States*, 226 F.Supp 556 at 58, District of Maryland, 1964; *Miller v. United States*, 500 F.2d 1007 at 1008 and 1009, Second Circuit, 1974; and *Ohio National Life Insurance Company*, 922 F.2d at 326 and 327. Further, a Court has extended the limitations period when am [sic] employee of the IRS told the taxpayer to ignore the notice of disallowance, *Beardsley v. United States*, 126 F.Supp 775 at 776, District of Connecticut, 1954.

In other cases, courts have found that the statute does not run when the IRS refuses to consider a claim that was filed prematurely. For example, when the correctness of the tax refund claim was dependent upon the outcome of a tax court case that had not yet been tried; *Schmidt v. Cavanaugh*, 91 F.Supp 659 at 661, Eastern District of [p. 71] Michigan, 1959, or when the notice does not completely disallow the taxpayer's claim. For example, when the notice reserves part of plaintiff's claim for further consideration; *Clinton Trust Company v. United States*, 52 F.Supp 671 at 679, Court of Claims, 1943, finding that "where the Commissioner did not reserve any

question for further consideration but merely gave a bad reason for the disallowance, the statute of limitations was not tolled."

In the present case, the notice of disallowance was mailed on January 13, 1992, and it contained the following language: "This letter is your legal notice that your claim is disallowed. We have disallowed the claim because your distribution does not qualify for the form 4972 special treatment since the money you contributed to your TSA was not taxable when the contributions were made to your TSA. Also, a rollover from a TSA to an IRA must be made within the 60 day period." And later, "If you want to bring suit to recover tax, the law permits you to do this within two years from the mailing date of this letter." In addition, the IRS sent a second letter on February 21, 1992 in which it reminded plaintiff of his option to bring suit.

Because the notice of disallowance was issued more than four years before Miller filed the present suit, the Court must find that the statute has run unless one or more of the equitable grounds cited above applies. Unfortunately [p. 72] for plaintiff, nothing in the notice of disallowance, in the subsequent letter, or in the facts of this case, indicates that any ground for tolling the statute of limitations exists here.

The IRS did not send Miller a second notice of allowance, did not inform him orally to ignore the notice of disallowance, and did not reserve part of plaintiff's claim for further consideration. Moreover, Miller never signed a waiver of notice of disallowance and did not file his claim with the IRS prematurely. Miller's remaining

grounds for finding the notice of disallowance ineffective are also meritless.

The IRS' failure to issue a 30 day letter does not confer upon taxpayers procedural or a substantive right. *First Alabama Bank v. United States,* 981 F.2d 1226 at 1230, note five, Eleventh Circuit, 1993, finding that IRS operating procedures such as the 30 day rule that are contained in the Internal Revenue manual, "Are a species of rule that is not judicially enforceable against the agency."

In addition, Miller has presented no issue of fact as to defendant's statute of limitations defense that would require resolution by a trier of fact. The fact that the specific grounds for his refund claim were not addressed by the IRS in the notice of disallowance does not create an issue of fact as to which the notice was ineffect [sic] – whether [p. 73] the notice was ineffective.

"So long as a taxpayer receives adequate notice of the Commissioner's disallowance, no particular form of notice is necessary to start the running of the period of limitations." *Smith v. United States,* 478 F.2d 398, at 399 and 400, Fifth Circuit, 1973, citing *A.G. Reeves Steel Construction Company v. Weiss,* 119 F.2d 472, Sixth Circuit, Cert Denied, 314 US 677, 1941. "Adequate notice consists of a clear statement as to the tax year involved, the type of tax, the exact amount of the refund sought, and the disallowance," citing *Smith* at 400.

The January 13, 1992 notice sent by the IRS to Miller contained all of these elements. Moreover, the last sentence of the relevant paragraph is responsive to the substance of the defendant's – of the plaintiff's claim.

For all the foregoing reasons, Miller's claim for refund is barred by the statute of limitations. The Court is, therefore, without subject matter jurisdiction to consider the merits of Miller's claims.

Accordingly, the Court will grant defendant's pending motion to dismiss. The Court further notes that the plaintiff would be unlikely to succeed on the merits even if his claims were not time barred as Section 403(b)(8)(c) of Title 26 does appear to incorporate the 60 day rollover period set forth in 26 USC Section 402(a)(5)(c).

[p. 74] Counsel, I will enter a formal order in conformity with this informal oral opinion. Thank you all very much.

THE CLERK: Please rise. This Honorable Court now stands adjourned.

(Whereupon, the proceedings concluded at 2:45 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

A. EUGENE MILLER	*	
	*	CIVIL NO. B-96-716
v.	*	
UNITED STATES OF AMERICA	*	
	*	

****

ORDER

Presently pending before the Court is defendant United States' Motion to Dismiss Plaintiff's Complaint (Paper 9). The issues raised by the motion have been briefed and the Court has had the benefit of oral argument at a hearing held today.

In accordance with the Court's oral opinion and rulings rendered in open court at the conclusion of the hearing, IT IS, this 8th day of November, 1996, by the United States District Court for the District of Maryland,

ORDERED:

(1) That defendant United States' Motion to Dismiss Plaintiff's Complaint (Paper 9) BE, and the same hereby IS, GRANTED;

(2) That plaintiff's Complaint BE, and the same hereby IS, DISMISSED; and

(3) That the Clerk shall mail a copy of this Order forthwith to counsel of record.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Senior Judge

Department of the Treasury
Internal Revenue Service

PHILADELPHIA, PA 19255

In reply refer to: 2859706916
Jan. 13, 1992 LTR 105C
205-20-2523 9012 30 000
01379

A EUGENE MILLER
6433 WEEMS AVE
FAIRHAVEN MD 20754-9523

App. 35

CERTIFIED MAIL

Taxpayer Identification Number: 205-20-2523
Kind of Tax: Income
Amount of Claim(s): $35,894.00

Date Claim(s) Received: Dec. 02, 1991
Tax Period(s): Dec. 31, 1990

Dear Taxpayer:

This letter is your legal notice that your claim is disallowed. We cannot allow your claim(s) for refund or credit for the period(s) shown above.

We have disallowed the claim because your distribution does not qualify for the Form 4972, special treatment. Since the money you contributed to your TSA, was not taxable when the contributions were made to your TSA. Also, a rollover from a TSA to an IRA must be made within the 60 day period.

You may submit a new claim if you have information that was not included on your original claim for refund or credit. However, this information must be received within three years from the original filing of the return.

If you want to bring suit to recover tax, penalties, or other amounts, you may do so by filing with the United States District Court having jurisdiction or the United States Claims Court. The law permits you to do this within two years from the mailing date of this letter. However, if you signed a waiver of the notice of disallowance (Form 2297), the period for bringing suit began to run on the date the waiver was filed.

If you have any questions, please write us at the address shown above. If you prefer, you may call the IRS telephone number listed in your local directory. An employee there may be able to help you, but this office is most familiar with your case.

BEST AVAILABLE COPY

GOVERNMENT EXHIBIT A(½)

Department of the Treasury
Internal Revenue Service

2859706916
Jan. 13, 1992 LTR 105C
205-20-2523 9012 30 000
01380

A EUGENE MILLER
6433 WEEMS AVE
FAIRHAVEN MD 20754-9523

When you write, please include in the spaces below, your telephone number and the hours you can be reached. Also include this letter. Keep a copy of this letter for your records.
Telephone Number (301) 855-0102 Hours 9:00 AM - 5:00 PM

Sincerely yours,

JOSEPH H. CLOONAN
DIRECTOR, SERVICE CENTER

Enclosures:
Copy of this letter
Publication 1

GOVERNMENT EXHIBIT
A172)

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

David W. Brown, Esquire
Knopf & Brown
1050 17th Street, N.W.
#1200
Washington, D.C. 20036

Person to Contact:
Lawrence W. Heben, Esquire

Telephone Number:
202-622-7736

Refer Reply to:
CP:E:EP:T:3
Date: APR 25 1995

Dear Mr. Brown:

This is in response to your letter of January 11, 1995, written on behalf of Mr. A. Eugene Miller, in which you ask the Internal Revenue Service to either enter into a closing agreement with Mr. Miller to settle tax issues described in your letter, or, in the alternative, issue a letter ruling permitting Mr. Miller to roll over into an individual retirement arrangement (IRA) a distribution he received in February, 1990, from his section 403(b) of the Internal Revenue Code tax-sheltered annuity. For the reasons described herein, the Service declines to enter into the requested closing agreement or issue the requested letter ruling.

Code section 403(b) sets forth rules governing the qualification of annuities purchased by tax-exempt organizations, and the taxation of distributions received from the annuities. With respect to distributions received prior to January 1, 1993, Code section 403(b)(8)(A) provided the general tax-deferred rollover rules with Code section 403(b)(8)(C) providing, in pertinent part, that rules similar to the rules of subparagraphs (B), (C), and (F)(i) of

section 402(a)(5) shall apply for purposes of subparagraph (A). Code section 402(a)(5)(C) provided that a transfer (of a distribution from a qualified retirement plan into an eligible retirement plan, e.g. an IRA) must be made within 60 days of receipt of the distribution. Thus, pursuant to Code section 403(b)(8)(C), a distribution received from a section 403(b) annuity prior to January 1, 1993, must have been rolled over into an IRA within 60 days of receipt.

As noted above, the time period within which a tax-deferred rollover of a pre-January 1, 1993 distribution must have been accomplished was expressly prescribed by section 403(b)(8)(C) of the Internal Revenue Code, a federal statute found at Title 26, United States Code. Furthermore, the Code applicable to pre-January 1, 1993 distributions did not provide for any exceptions to the 60-day rollover period that would be relevant to your case. Therefore, we do not believe there is any basis for issuing a private letter ruling permitting your client to roll over his pre-January 1, 1993 Code section 403(b) annuity distribution.

With respect to the applicability of the forward averaging method of taxation to the 1990 distribution received by Mr. Miller from his Code section 403(b) annuity, Code section 402(e)(1) provided that lump sum distributions were eligible for 5-year averaging tax treatment as long as the conditions of Code section 402(e) were met.

Section 1124(h)(3) of the Tax Reform Act of 1986 (TRA '86) provides that individuals who attained age 50 before January 1, 1986, can elect to have their lump sum distributions taxed in accordance with the 10-year

averaging method of taxation as found in the Code prior to the effective date of TRA '86 in lieu of electing 5-year averaging treatment.

With respect to the eligibility of a 1990 distribution for either 5-year and 10-year averaging, section 402(e)(4)(A) of the Code provided that such eligible distribution must have been either from a trust which forms part of a plan qualified under section 401(a) and which is exempt from tax under section 501 or from a plan described in section 403(a). Thus, under section 402(e) of the Code, distributions from section 403(b) annuities were not eligible for averaging treatment.

Code section 403(b), as effective with respect to 1990 distributions, contained no provision providing that said distributions would be eligible for either 5-year or 10-year averaging.

With specific reference to Mr. Miller's situation, the instructions for the Form 4972, *Tax on Lump Sum Distributions,* used by him to claim 10-year averaging with respect to his Code section 403(b) annuity distribution indicated that a qualifying lump sum distribution must have been from a qualified pension, profit-sharing, or stock bonus plan. This conforms with former Code section 402(e)(4) which required an eligible lump sum distribution be from either a qualified Code section 401(a) plan or a section 403(a) plan. As noted above, a Code section 403(b) annuity is not a qualified Code section 401(a) plan.

Additionally, it appears from your January 11, 1995 letter that Mr. Miller made no attempt to verify that his distribution was eligible for averaging. He did not consult either the Code or the Income Tax Regulations

promulgated thereunder; he did not consult a representative of the Service or seek tax advice from either a qualified tax attorney or another tax professional; and he did not contact Prudential Asset Management Company, which administered his section 403(b) annuity, to verify that his distribution was eligible for averaging. This contact could have disposed of the issue as Prudential did advise Mr. Miller in January, 1991, that his distribution was ineligible for either 5-year or 10-year averaging.

Thus, based on the foregoing, we do not believe that it would be appropriate for the Service to either enter into the desired closing agreement or issue the requested letter ruling.

Please note that this letter does not constitute a letter ruling and may not be relied upon as such with respect to any specific transaction. If your client, Mr. Miller, wishes to receive a letter ruling, as was indicated in the Service's May 6, 1994 letter to him, he must pay the appropriate user fee. However, note that any letter ruling issued to Mr. Miller will reach a conclusion that is consistent with the law applicable to 1990 Code section 403(b) annuities summarized herein.

If you have any questions with respect to this letter, please feel free to contact Larry Heben of this Branch at the number provided above.

Sincerely yours,

/s/ Evelyn A. Petschek
Evelyn A. Petschek
Director, Employee
Plans Division

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
NOV - 2 1995

(LOGO)

ASSISTANT COMMISSIONER
(EMPLOYEE PLANS AND
EXEMPT ORGANIZATIONS)

David W. Brown
Knopf & Brown
1050 Seventeenth St., N.W.
Suite 1200
Washington, D.C. 20036

Re: A. Eugene Miller

Dear Mr. Brown:

This letter responds to your request for our assistance in the matter of Mr. Miller's application for a refund of his 1990 tax. As part of our consideration of this matter we requested and reviewed the file related to Mr. Miller's Form 1040X, as well as materials from the Office of Appeals generated in the processing of this case. We have also reviewed the material you submitted in support of your client's request and the material previously submitted to the Employee Plans Division, an office that falls within my jurisdiction. Finally, we requested assistance from the Chief Counsel's Office on issues related to your client's claim. I apologize for the delay in responding, but all the above took time and the tax return file had to be obtained from a Federal Records Center.

Unfortunately, I am unable to assist you on this matter as there is no justiciable claim outstanding. Counsel

advises that I have no legal authority to grant or deny your claim after the expiration of a two year period following the notice of disallowance (*See* section 6532 of the Internal Revenue Code). This result occurs without regard to whether your client filed a second Form 1040X.

I regret that I cannot be of greater assistance.

Sincerely,

/s/ James J. McGovern
James J. McGovern

APPENDIX A

Standard IRS Income Tax Refund Claim Processing Standards and Procedures

1. Incomplete, invalid and untimely claims are disposed of without detailed review by an examiner. IRM § 4144.21.

2. Claims not immediately processed without examination are categorized for screening. IRM § 4144.23(1).

3. A preliminary examination is conducted to determine if the claim can be disposed of without further action. IRM § 4512.1.

4. Claims not disposed of by preliminary examination are assigned for regular examination. IRM § 4513.1.

5. The same policies and standards that govern merits-based examination of returns govern refund claims. IRS Policy P-4-75, IRM p. 1218-62; IRM § 4513.1(3), (4).

6. Recognizing that a taxpayer may be awarded attorney's fees if the Service's decision does not have a reasonable basis in law and fact, IRM § 424(16).1, strict adherence to IRM standards is required of examiners. IRM § 424(16).2(3)(b). The examiner is "charged with the duty of . . . try[ing] to find the true meaning of the statutory provision and not to adopt a strained construction in the belief that he is 'protecting the revenue.' " He must apply and administer "the law in a reasonable, practical manner." IRM § 424(16).2(3)(c). *See* IRM § 4412.11(1).

7. Examiners must be aware that "problems will often arise because of unfamiliarity with the subject," Examiner Tax Audit Guidelines, § 225(1). IRM p. 4231-10, and that he "cannot perform adequately" without such familiarity. *Id.* § 225(3).

8. The examiner's written report should be supported by citations to relevant authorities so that it is "informative from the taxpayer point of view and reflect[s] credit on the examination as a professional undertaking." IRM § 424(14).1. *See* IRM § 4144.31(4).

9. If the taxpayer's claim is disallowed in full, he is furnished a copy of the examination report and provided a preliminary (30-day) letter advising of his right to appeal. IRM § 4431(1); Exhibit 4430-1 (IRM p. 4400-40.1). The reasons for the disallowance are to be sent to the taxpayer. IRM § 4513.1(2).

10. A taxpayer response that he disagrees with the preliminary letter will be treated as a protest and/or a request for Appeals consideration of the decision. IRM § 4433.1, § 4433.3, § 4441.

11. Appeals normally must be requested within 30 days of the preliminary disallowance, but an extension will be granted under reasonable circumstances, such as when the issues are complex and require considerable legal research. IRM § 4433.2.

12. When Appeals takes a case, its work is thereafter coordinated with the other relevant Service Offices. IRM § 4443.

13. When the issues are so unusual or complex as to warrant consideration by the National Office, the case may be referred there for technical advice. Denial of a taxpayer request for such a referral must be in writing, stating the reasons therefor. If the taxpayer disagrees, the denial will be reviewed at the Assistant Commissioner level. IRS Policy Statement P-4-82, IRM p. 1218-63.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

A. EUGENE MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the notice of administrative claim disallowance transmitted to petitioner commenced the running of the statute of limitations on petitioner's judicial refund suit.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	3
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Block-Southland Sportswear, Co. v. *United States*, 73-1 U.S. Tax Cas. (CCH) ¶ 9230 (E.D.N.C. Nov. 24, 1972), aff'd, 480 F.2d 921 (4th Cir. 1973)	9, 10
Charlson Realty Co. v. *United States*, 384 F.2d 434 (Ct. Cl. 1967)	10
Clinton Trust Co. v. *United States*, 52 F. Supp. 671 (Ct. Cl. 1943)	11
First Alabama Bank v. *United States*, 981 F.2d 1226 (11th Cir. 1993)	11
L & H Co. v. *United States*, 963 F.2d 949 (7th Cir. 1992)	10
Miller v. *Insurance Inst. for Highway Safety and the Prudential Ins. Co.*, No. 92-943-A (E.D. Va. Nov. 17, 1992)	5
Schmitt v. *Kavanagh*, 91 F. Supp. 659 (E.D. Mich. 1950)	10
Smith v. *United States*, 478 F.2d 398 (5th Cir. 1973)	8
Soriano v. *United States*, 352 U.S. 270 (1957)	8
Union Commerce Bank v. *United States*, 638 F.2d 962 (6th Cir. 1981), aff'g 463 F. Supp. 842 (N.D. Ohio 1978)	10
United States v. *Dalm*, 494 U.S. 596 (1990)	8
W.A. Schemmer Limestone Quarry, Inc. v. *United States*, 240 F. Supp. 356 (S.D. Iowa 1964)	10

Statutes: Page

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 5
Internal Revenue Code (26 U.S.C.):
§ 6532 6
§ 6532(a) 7, 8
§ 6532(a)(1) 8, 10
§ 6532(a)(2) 6
§ 6532(a)(4) 6
§ 7422 7

Miscellaneous:

M. Saltzman, *IRS Practice and Procedure* (2d ed. 1991) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unpublished, but the decision is noted at 117 F.3d 1414 (Table). The opinion of the district court (Pet. App. 25-33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1997. The petition for rehearing was denied on November 24, 1997 (Pet. App. 16). The petition for certiorari was filed on February 23, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 6532 of the Internal Revenue Code, 26 U.S.C. 6532, provides in relevant part:

> **(a) Suits by taxpayers for refund.—**
>
> **(1) General rule.**—No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.
>
> **(2) Extension of time.**—The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.
>
> **(3) Waiver of notice of disallowance.**—If any person files a written waiver of the requirement that he be mailed a notice of disallowance, the 2-year period prescribed in paragraph (1) shall begin on the date such waiver is filed.

> **(4) Reconsideration after mailing of notice.**—Any consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of a notice by certified mail or registered mail of disallowance shall not operate to extend the period within which suit may be begun.
>
> * * * * *

STATEMENT

1. In February 1990, shortly after retiring from a nonprofit association, petitioner received a check for $168,028.47 as a lump-sum distribution of a tax sheltered annuity (TSA) set up for him by his employer. After consulting Internal Revenue Service publications, petitioner erroneously concluded that his TSA distribution was eligible for ten-year income averaging.[1] Accordingly, petitioner elected not to roll over his TSA distribution into an IRA and decided to report and pay the estimated tax for 1990 that would have been due under the ten-year averaging method (Pet. App. 20).

In early 1991, petitioner learned from his former plan administrator that he could not use ten-year

---

[1] Petitioner incorrectly characterizes these publications as "misleading and wrong" (Pet. 4). The record before the district court showed only that the publications described some types of distributions that were eligible for income averaging without specifically mentioning that TSA distributions were *not* eligible. Pet. App. 39. The applicable provisions of the Code and regulations, however, clearly reflected that TSA distributions were not eligible for income averaging (*ibid.*). Petitioner evidently reached his incorrect contrary conclusion without reading these statutes or regulations and without consulting a tax professional (*id.* at 39-40).

averaging for his TSA distribution. Petitioner paid the taxes due on the entire TSA distribution and then, after consulting with legal counsel, filed an administrative refund claim with the IRS, together with a six-page letter explaining the claim. In this letter, petitioner stated that he had erroneously believed the TSA distribution to be eligible for ten-year income averaging and that he otherwise would have rolled the TSA into an IRA. He requested permission from the IRS to now make such a rollover retroactively. He claimed that the applicable statute and regulations did not set a deadline for a rollover from a TSA to an IRA or that, if they did, the IRS had discretion to waive the deadline and should do so in his case (Pet. App. 21).

In response to his claim for refund, the IRS Philadelphia Service Center sent petitioner a formal notice of claim disallowance on January 13, 1992. That notice stated that "[t]his letter is your legal notice that your claim is disallowed" (Pet. App. 35). The notice further informed petitioner of his right to sue for a refund and of the two-year statute of limitations for filing suit (*ibid.*):

> If you want to bring suit to recover tax, penalties, or other amounts, you may do so by filing with the United States District Court having jurisdiction or the United States Claims Court. The law permits you to do this within two years from the mailing date of this letter.

The notice also contained the following brief explanation for the disallowance of petitioner's claim (*ibid.*):

> We have disallowed the claim because your distribution does not qualify for the Form 4972, special treatment. Since the money you contributed to

> your TSA, was not taxable when the contributions were made to your TSA. Also, a rollover from a TSA to an IRA must be made within the 60 day period.

From January 1992 to March 1996, petitioner and his counsel communicated with various IRS officials in Philadelphia, Baltimore and Washington, D.C., in an effort to persuade the IRS to reconsider its January 13, 1992, notice of disallowance.[2] Early in this process, on February 21, 1992, the IRS sent petitioner a letter making reference to its prior notice of claim disallowance and reminding him of his right to sue. Petitioner received additional letters from the IRS offices that he contacted that repeated the IRS's position that the time period for a TSA rollover could not be extended beyond the 60 days provided in the statute. None of these letters stated or in any way implied that the IRS was withdrawing its January 1992 notice of claim disallowance or that it was agreeing to an extension of the limitations period. On November 2, 1995, in the last letter sent to petitioner before the filing of this suit, the IRS informed petitioner that it would not allow his refund claim for the additional reason that the two-year limitations period for a refund suit had expired (Pet. App. 42).

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[2] Petitioner filed a suit against his former employer and the plan administrator in the United States Court for the Eastern District of Virginia, seeking damages for an asserted breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, for failing to advise him that his TSA distribution was not eligible for income averaging. The district court dismissed that suit in 1992. *Miller* v. *Insurance Inst. for Highway Safety and the Prudential Ins. Co.*, No. 92-943-A (E.D. Va.).

2. Petitioner filed the complaint initiating this refund suit on March 8, 1996, more than four years after the IRS mailed the notice of disallowance of his administrative refund claim. The district court granted the government's motion to dismiss the suit as untimely (Pet. App. 25-33). The court of appeals affirmed with a per curiam opinion (*id.* at 1-5).

The court of appeals pointed out that compliance with the unambiguous two-year limitations period in the statute is a condition of the government's waiver of sovereign immunity for tax refund suits (Pet. App. 4). The court noted (*ibid.*) that 26 U.S.C. 6532(a)(4) expressly provides that reconsideration by the IRS of a disallowed claim will not toll the running of the two-year period for filing suit. The court added that petitioner could have sought an extension of the two-year period from the IRS under 26 U.S.C. 6532(a)(2) but failed to do so (Pet. App. 4). The court explained that the notice of disallowance plainly satisfied the requirements of the statute because it was unambiguous in informing petitioner that his claim had been disallowed and included a brief explanation of the reasons for the disallowance of petitioner's claim (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner's principal argument is that the January 1992 notice of claim disallowance was not sufficient to start the running of the Section 6532 limitations period for filing a refund suit because it did not expressly reflect that the IRS had considered all of

the grounds for refund contained in petitioner's refund claim (Pet. 10). That contention is both factually and legally incorrect.

a. The argument is factually in error because, as the court of appeals noted, the notice "included a brief explanation of the reasons for [the] disallowance" (Pet. App. 4). After clearly advising petitioner that his claim for refund was "disallowed," the notice explained that it was disallowed because the TSA did not qualify for the "Form 4972 [ ] special treatment" for income averaging and because "a rollover from a TSA to an IRA must be made within the 60 day period" (Pet. App. 35). The notice thus expressly responded to the contentions of petitioner's refund claim that no 60-day requirement for rollover of a TSA applied and that, if one applied, the IRS should exercise discretion to excuse it in his case. See page 4, *supra*. As the court of appeals explained, this succinct and clear denial of the refund claim was "adequate notice" to commence the running of the statute of limitations (Pet. App. 4, 35-36). Indeed, the notice was not merely "adequate" it was crystal clear—for it expressly advised petitioner (who was by then represented by counsel) that the period within which a refund suit could be brought was "two years from the mailing date *of this letter*" (*id.* at 35 (emphasis added)).

b. Even if it were assumed that the explanation in the January 1992 notice for the disallowance of petitioner's claim was incomplete, that would not affect the efficacy of the notice. The right to maintain a refund suit under 26 U.S.C. 7422 is expressly conditioned on the taxpayer's compliance with 26 U.S.C.

6532(a).[3] The two-year limitations period for filing a refund suit provided in 26 U.S.C. 6532(a) commences upon the mailing of a notice of disallowance. 26 U.S.C. 6532(a)(1). There is no requirement in the Internal Revenue Code or in the regulations that the notice of disallowance contain any explanation whatever of the reasons for disallowance. As long as the notice that the refund claim has been disallowed properly identifies the tax for which a refund is sought and clearly advises the taxpayer that the claim for a refund of that tax has been disallowed, it is effective to trigger the running of the two-year limitations period. See, *e.g.*, *Smith* v. *United States*, 478 F.2d 398, 399-400 (5th Cir. 1973).

A taxpayer's right to bring a refund suit is not conditioned upon receiving any particular form of denial of its claim for refund. Indeed, a taxpayer may file a refund suit if the IRS has not even acted on the claim for refund if six months has passed from the date the claim was filed. 26 U.S.C. 6532(a)(1). Taxpayer refund suits are therefore frequently filed before the IRS has taken any action whatever on the claim for refund.[4]

The obvious purpose of the notice of disallowance is to advise the taxpayer formally that the IRS has disallowed his claim for refund and that, conse-

---

[3] The Court has emphasized that these conditions on the waiver of sovereign immunity must be strictly construed in favor of the United States. *United States* v. *Dalm*, 494 U.S. 596, 608 (1990); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

[4] Petitioner is thus clearly wrong in asserting (Pet. 12-13) that Congress intended that the IRS would always pass on the merits of a taxpayer's refund claim before the claim became the subject of a refund suit.

quently, he must bring suit within two years if he wishes to continue to pursue his claim. The notice of disallowance sent to petitioner in January 1992 could not have been clearer in informing petitioner that his claim for refund had been disallowed, for it states (Pet. App. 35):

> This letter is your legal notice that your claim is disallowed. We cannot allow your claim(s) for refund or credit for the period(s) shown above.

The notice also expressly advised petitioner of his right to sue and of the fact that he was required to sue "within two years from the mailing date of this letter" (*ibid.*). The notice was therefore effective to trigger the running of the two-year limitations period. Because petitioner's refund suit was filed four years after the notice of claim disallowance was mailed to him, the courts below correctly concluded that it is barred by the statute of limitations.

c. The cases on which petitioner seeks to rely (Pet. 16-19) are inapposite. In *Block-Southland Sportswear, Co.* v. *United States*, 73-1 U.S. Tax Cas. (CCH) ¶ 9230 (E.D.N.C. Nov. 24, 1972), aff'd per curiam, 480 F.2d 921 (4th Cir. 1973), the taxpayer argued that preliminary audit analysis from the Service—known as a "thirty-day letter"[5]—constituted a notice of disallowance of a refund claim and that the taxpayer should therefore be permitted to file

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[5] A "thirty-day letter" is prepared by an IRS examiner. It contains the preliminary results of the examination of a contested return and conveys an invitation to the taxpayer either to accept the results of the examination or (i) provide additional information to the Service or (ii) request a conference with the Service to discuss the examination. See M. Saltzman, *IRS Practice and Procedure* ¶ 8.08 (2d ed. 1991).

a refund suit before the six-month period provided in 26 U.S.C. 6532(a)(1) expired. The court concluded in *Block-Southland* that such preliminary audit correspondence does not constitute a notice of disallowance. 73-1 U.S. Tax Cas. (CCH) at 80,419. In the present case, however, the document mailed to petitioner in January 1992 was plainly not a preliminary thirty-day letter issued as part of an audit examination (see note 5, *supra*). Instead, as the courts below correctly held (Pet. App. 4, 32), it was a formal notice of disallowance that advised petitioner of the rejection of his refund claim.

The other cases cited by petitioner are similarly irrelevant. In *Union Commerce Bank* v. *United States*, 638 F.2d 962 (6th Cir. 1981), aff'g 463 F. Supp. 842 (N.D. Ohio 1978), a taxpayer claimed that the notice of disallowance sent to it was invalid because its refund claim had not been in compliance with Treasury regulations. The Sixth Circuit held that any defects in the refund claim did not affect the validity of the notice of disallowance and that the limitations period began with the mailing of that notice. 638 F.2d at 963. In *Schmitt* v. *Kavanagh*, 91 F. Supp. 659, 661-663 (E.D. Mich. 1950), the taxpayer's refund claim was intertwined with a pending Tax Court case involving a related taxpayer, and the purported notice of disallowance stated *on its face* that the IRS would not consider the claim until the Tax Court case was resolved. Similarly, *L & H Co.* v. *United States*, 963 F.2d 949, 951 (7th Cir. 1992); *Charlson Realty Co.* v. *United States*, 384 F.2d 434, 439-440 (Ct. Cl. 1967); and *W. A. Schemmer Limestone Quarry, Inc.* v. *United States*, 240 F. Supp. 356, 358 (S.D. Iowa 1964), do not support petitioner, because they hold only that a second timely filed refund

claim that asserts a new ground for a refund begins the claim-disallowance process anew. Petitioner does not allege that he filed a second refund claim asserting new grounds. Finally, *Clinton Trust Co.* v. *United States*, 52 F. Supp. 671, 679 (Ct. Cl. 1943), does not stand, as petitioner asserts (Pet. 18-19), for the proposition that a notice of disallowance must expressly disallow all of the grounds for refund. Instead, *Clinton* held that, even when the IRS gives an *erroneous* reason for disallowance, the notice of disallowance is still effective to commence the running of the statute of limitations. 52 F. Supp. at 679.

2. Petitioner incorrectly asserts (Pet. 19-23) that the decision in this case conflicts with the decision of the Eleventh Circuit in *First Alabama Bank* v. *United States*, 981 F.2d 1226, 1230 n.5 (1993). In *First Alabama*, after the IRS had issued a notice of disallowance of a refund claim, an IRS employee had informed the taxpayers orally that the statute of limitations was not running. The Service thereafter issued a second notice of disallowance of the claim. 981 F.2d at 1227-1228. Notwithstanding the asserted confusion resulting from this series of events, the court of appeals concluded that there was insufficient evidence that the first notice of disallowance had been withdrawn and therefore upheld the dismissal of the taxpayers' suit as untimely. *Id.* at 1230.

The court suggested in *First Alabama* that, if letters or other communications sent to a taxpayer *after* the formal notice of disallowance cause the taxpayer to be reasonably confused as to whether the notice has been withdrawn, the two-year limitations period for filing suit would not commence. 981 F.2d at 1230. In the present case, however, there were no communications between petitioner and the IRS after

the notice of claim disallowance that provided any basis for petitioner to conclude that the IRS had withdrawn the notice of claim disallowance. The contention that the decision in this case conflicts with *First Alabama* is thus plainly incorrect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

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A. EUGENE MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. RESPONSE TO THE GOVERNMENT'S STATEMENT OF FACTS 1

II. RESPONSE TO THE GOVERNMENTS'S ARGUMENT 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Boddie-Noell Enterprises, Inc. v. United States, 36 Fed. Cl. 722 (1996) 9

First Alabama Bank, N.A. v. United States, 981 F.2d 1226 (11th Cir. 1993) 9, 10

Mertens v. Hewitt Associates, 508 U.S. 248 (1993) 4

Scheuer v. Rhodes, 416 U.S. 232 (1974) 3

Union Commerce Bank v. United States, 463 F. Supp. 842 (N.D. Ohio 1978), *aff'd*, 638 F.2d 963 (6th Cir. 1981) 8

FEDERAL STATUTES:

26 U.S.C. § 402(e)(4)(A) 4

26 U.S.C. § 403(b) 4

26 U.S.C. § 6532(a) 5, 6, 8, 9

26 U.S.C. § 6532(a)(2) 2

26 U.S.C. § 6532(a)(4) 2

29 U.S.C. § 1132(a)(3) 4

FEDERAL REGULATIONS:

Treas. Reg. § 1-9100-1 (1970) 1, 2, 5

FEDERAL RULES:

Supreme Court Rule 15.2 10

REPLY BRIEF IN SUPPORT OF PETITION

I. RESPONSE TO THE GOVERNMENT'S STATEMENT OF FACTS

The government's restatement of the facts corrects nothing in the Petition, distorts the record, and ineffectually attempts to divert attention from the merits by interjecting matters that are either erroneous or irrelevant.

1. The government asserts that Mr. Miller received "additional letters" from the Service that "repeated" the Service's position "that the time period for a TSA rollover could not be extended beyond the 60 days provided in the statute." Opp. Br. 5. But the record discloses no IRS letter or statement to Mr. Miller regarding his Treas. Reg. § 1-9100-1 extension request until April 25, 1995. Moreover, "the 60 days" are not "provided in the statute." As the 1995 IRS letter reveals, to reach this conclusion one must consult a cross-referenced provision in the Code and apply unstated "rules similar to [those] rules." App. 37.

2. The government notes that IRS letters did not state or imply that it was withdrawing its purported notice of disallowance or that it was agreeing to extend the limitations period. Opp. Br. 5. Mr. Miller's basic claim (Issue 1) is the limitations period was not properly triggered until April 25, 1995; this issue does not involve any claim of withdrawal or extension of a viable notice beforehand. The government's point also has no relevance to resolution of the question of law presented by Issue 2.

3. The government characterizes Mr. Miller's contacts with various IRS offices as an effort to get the Service "to reconsider" the January 13, 1992 "disallowance." *Id.* This dovetails with its emphasis on the Fourth Circuit's observation that Code § 6532(a)(4) "expressly provides that reconsideration by the IRS of a disallowed claim will not toll the running of the two-year period for filing suit." Opp. Br. 6. As question-begging, this argument has no peer. There can be no "reconsideration" of that which has never been given "consideration." *See* Pet. 18 n.3.

4. Similarly irrelevant is the government's and the lower court's emphasis on Mr. Miller's failure to seek an extension of the two-year limitations period under § 6532(a)(2). Opp. Br. 5-6. There is no need for extension of a period that has not begun to run. Moreover, on this record, there is no evidence that Mr. Miller had even a remote chance of having such an extension request granted before the second anniversary of the January 13, 1992 notice. At that point, he was still almost a year from completing his uphill climb to a first face-to-face meeting with National Office personnel with the authority (and expertise) to consider his § 1-9100-1 request. Pet. 7.

5. The government asserts that Mr. Miller has incorrectly characterized IRS publications as misleading and wrong. Opp. Br. 3 n.1. The cited reference (App. 39) does not address much less demonstrate this. In the trial court, the government sought dismissal on the pleadings with extrinsic reference to only one exhibit, the purported disallowance notice. Pet. 3. But in detailed chapter and

verse, Mr. Miller's complaint and declaration in opposition explained why he had been misled by IRS publications and forms.[1] The government is surely aware of the settled rule that in passing on a motion to dismiss for lack of subject matter jurisdiction, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The government is evidently concerned that its jurisdictional arguments cannot stand on their own. But propping them up with unsound, unsubstantiated and irrelevant points serves only to weaken the response further.

6. The same can be said of the rest of the government's attempt to blame the victim, i.e., irrelevant argument that Mr. Miller was negligent in failing to read statutes and regulations and failing to consult a tax professional. Opp. Br. 3 n.1. As the government well knows, one cannot point to any statutory or regulatory provision

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[1] Pet. 3. As Mr. Miller's 14-page declaration filed in opposition to the government's motions to dismiss explained, without contradiction by the government, the 1989 tax year version of IRS publications specifically addressed to retirement plan distributions, i.e., Publications 571 and 575, "state that, in general, the rules applicable to TSA distributions are the same as those for other retirement plan distributions, and a long list of particular distributions ineligible for averaging treatment nowhere mentions TSA distributions." Miller Declaration ¶ 5 at 2-3 (Aug. 6. 1996). The next year the detailed list of ineligible distributions (eleven in all) was lengthened by adding TSA distributions. *Id.* ¶ 6 at 3 and Exhibit G thereto at 2-4. Based on this, Mr. Miller's complaint unequivocally alleges that "any reasonable person, giving the same careful consideration to these documents as did plaintiff, could only have reached the same reasonable conclusion that plaintiff reached." Complaint ¶ 9. App. 19-20.

that states that TSA distributions are not eligible for income averaging. Such ineligibility derives not from a prohibition "clearly reflected," *id.*, in the Code and regulations, but only by negative inference from the Code's failure to expressly allow it (i.e., the Code's failure to mention section 403(b) in particular in the "lump sum distribution" definition in § 402(e)(4)(A)). *See* App. 39. If allowed to proceed to trial, Mr. Miller will demonstrate the reasonableness of his reliance on his own abilities and relevant Service forms and publications rather than a "tax professional."[2]

7. Yet another diversion is the government's discussion of Mr. Miller's litigation against his plan administrator. Opp. Br. 5 n.2. Perhaps the government is attempting to imply that Mr. Miller's claims must be baseless because his ERISA claims were dismissed at the district court level. But four Justices of this Court would probably have concluded otherwise as to his ERISA claims.[3]

---

[2] For example, in response to the government's motion to dismiss, Mr. Miller documented these uncontradicted – and indisputable – facts: (1) the "problem with the IRS documents relied upon by plaintiff persisted for only the year in which plaintiff consulted them," and he would not have been misled by them in any other year. Complaint ¶ 10. App. 20; and (2) in early 1991, the "tax professionals" at Mr. Miller's TSA plan administrator that advised him of his error relied on the next-year's version of these same publications. Pet. 4.

[3] Mr. Miller's ERISA complaint was dismissed at the district court level while certiorari was pending in several cases in this Court on the controlling point of law – the availability of damages for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). When this Court decided this question by a 5-4 vote adversely to Mr. Miller's claim, *Mertens v. Hewitt*

Alternatively, the government may be suggesting that Mr. Miller was preoccupied with his ERISA litigation and failed to diligently pursue his refund claim with the Service. But Mr. Miller's diligence, well documented in the record, is not in issue here. Moreover, the ERISA litigation was over in June 1993, long before Mr. Miller ever was able to get someone at IRS to address his § 1-9100-1 request, and the timely pursuit of his refund claim is extensively documented in the trial court, uncontradicted by the government. Again, if the government truly believed it is entitled to prevail under Code § 6532(a) as a matter of law, it would not be ineffectually nitpicking the facts.

II. RESPONSE TO THE GOVERNMENT'S ARGUMENT

The government takes only selected issue with the reasons advanced for granting the petition and wraps its response around defense of the decision below. Opp. Br. 6. In effect, the government does not dispute petitioner's claim that, whatever the outcome, Issue 1 is an important one for this Court to decide. And as to both Issue 1 and Issue 2, the government's argument that there is no conflict is, in reality, nothing more than argument addressed to the merits. Petitioner will not belabor the merits here, but there are some defects in the government's response that should be noted.

Associates, 508 U.S. 248 (1993), Mr. Miller voluntarily dismissed his appeal, then pending in the Fourth Circuit, Dkt. No. 92-2448.

1. The government fails in its attempt to demonstrate that Mr. Miller's principal claim (Issue 1) is factually and legally unsound.

a. The government absurdly claims that the tag line in the purported disallowance – "Also, a rollover from a TSA to an IRA must be made within the 60-day period." Opp. Br. 5 – "expressly responded" to Mr. Miller's request that "the IRS should exercise discretion to excuse [the 60-day requirement] in his case." *Id.* at 7. The tag line is characterized as a "clear denial of the refund claim." *Id.* If this is the Service's idea of clarity, coming as it does after a broken sentence "disallowing" the claim on a ground not presented, Pet. 5-6, taxpayers would perhaps be better served by the government's alternative line of defense, i.e., "there is no requirement in the Internal Revenue Code or in the regulations that the notice of disallowance contain any explanation whatsoever of the reasons for the disallowance." *Id.* at 8. But in either case, the government's extraordinarily lax interpretation of Congress' expectation of merits-based consideration of refund claims (a) is inconsistent with its own internal procedures, Pet. 12; and (b) constitutes an untenable shift of its statutory responsibilities to the courts. *Id.* at 13-14. The government's response ignores both of these points.

b. The government cites the taxpayer's freedom to initiate suit on a refund claim without a Service decision on the merits six months after filing as proof that Congress did not mean merits-based disallowances were the rule when it enacted § 6532(a). Opp. Br. 8. But the government ignores the caselaw making clear that the waiting period is for the explicit purpose of giving the Service time to consider the merits. Pet. 11-12, 13-14. That

Congress also expected **timely** decisions, and concluded that the Service should not be allowed to keep a taxpayer waiting more than six months if it had not yet decided the claim, changes nothing. The government suggests that tax refund litigation is "frequently," Opp. Br. 8, commenced via this pre-disallowance-six-month-waiting-period option. The Service does not say whether the proportion of such cases to all refund cases amounts to more than the minor exception that proves the rule. Even if the number is more than trivial, however, it would only suggest that Congress' judgment about the time needed for a decision on the merits in almost all cases was a little off. It would still not cast doubt on the basic presentment-disallowance-litigation scheme for refund claims in the Code. Pet. 11-15.

c. No slave to understatement, the government asserts that the notice Mr. Miller received was "crystal clear," Opp. Br. 7, and "could not have been clearer in informing petitioner that his claim had been disallowed." *Id.* at 9. As to certain aspects of the notice, Mr. Miller agrees and has so informed the Court: "As the Court of Appeals has observed, the notice was unambiguous in certain respects: it correctly identified the tax year, the type of tax, and the amount of refund claimed." Pet. 5. But left unanswered is Mr. Miller's claim that none of this matters if there has been no "disallowance," i.e., no decision reflecting a rational nexus between request and denial, Pet. 12, either on the face of the notice or at least in the Service's records. *Id.* at 17.[4]

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[4] At no point in this litigation has the Service suggested that there exists any pre-disallowance (i.e., pre-January 13,

d. The government expends most of its effort attempting to distinguish the cases cited by petitioner. Opp. Br. 9-11. It examines the trees but overlooks the forest. The transcendent principle in these cases is that the resolution of the § 6532(a) issue turns on whether there was Service consideration of the merits of the refund claim. Put another way, the courts in all these cases understood the obvious linkage between the taxpayer's right to litigate his refund claim in federal court and his obligation to first fully present his claim to the Service and await a decision. If the statutory scheme were more doubtful in this respect, the government's exercise might have some probative force, but all it succeeds in demonstrating is that no two cases are exactly alike. For example, in *Union Commerce Bank v. United States*, 463 F. Supp. 842 (N.D. Ohio 1978), *aff'd*, 638 F.2d 962 (6th Cir. 1981), the government was successful in triggering the limitations period because it persuaded the court that it had "considered the merits of the refund claim." 638 F.2d at 963. The government offers no explanation why, if consideration of the merits of an adequately presented claim may be used as a limitations **sword** by the government under § 6532(a), its failure to consider the merits is not a **shield**. Similarly, the government fails to explain why Mr. Miller's situation, where at least one ground for refund was not considered, is distinguishable in principle from the situation where, as even the government admits, assertion of "a new ground for a refund begins the claim-disallowance process anew." Opp. Br. 11. *See* Pet. 18.

1992) internal Service records that reflect consideration and rejection of Mr. Miller's second ground for refund.

e. This reply is neither the time nor place for a complete response to the government's erroneous views regarding Issue 1. Upon plenary consideration, petitioner will more fully demonstrate that the interrelationship of administrative and judicial decisionmaking on tax refund claims admits of only one conclusion: the January 13, 1992 "disallowance" received by Mr. Miller did not trigger the § 6532(a) limitations period as to the second of his two grounds for refund.[5]

2. The government's response to Issue 2, Opp. Br. 11-12, also exhibits a penchant for irrelevant argument. What Mr. Miller said about *First Alabama Bank, N.A. v. United States*, 981 F.2d 1226, 1230 n.5 (11th Cir. 1993), is that "a taxpayer in a refund suit may invoke the Service's failure to follow its own rules and procedures as evidence 'that what in fact transpired was not' what the Service claimed it to be," and that the applicable legal standard was "reasonable confusion on the part of the taxpayer. . . . " Pet. 22. Rather than contest this reading of *First Alabama*, the government apparently claims that, on

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[5] For example, the government will be hard-pressed to explain how *pro forma* disallowances are to fit into a scheme that absolutely precludes refund litigants such as Mr. Miller from varying in court either the factual or the legal basis for the claim presented to the IRS. As with the rest of the statutory scheme, this variance rule is designed

> to give adequate notice to the Service of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination.

Boddie-Noell Enterprises, Inc. v. United States, 36 Fed. Cl. 722, 729 (1996) (citations and internal quotations omitted).

the facts, Mr. Miller could not have been "reasonably confused." Opp. Br. 11. Mr. Miller disagrees, but that disagreement is completely beside the point at this stage. What is relevant is Mr. Miller's claim that both the government and the Court of Appeals misread petitioner's reliance on the *First Alabama* rule, both in the main appeal and on reconsideration, such that the Fourth Circuit's handling of the legal issue is in conflict with that of the Eleventh Circuit. Pet. 22. By not answering this point, the government has conceded it. Supreme Court Rule 15.2. Again, without regard to how Issue 2 should be decided in this case, the issue is an important one, worthy of this Court's consideration if certiorari is granted as to Issue 1.

CONCLUSION

For the reasons stated above and in the Petition, this Court should grant the writ of certiorari.

Respectfully submitted,

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